Supreme Court, U.S.
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Case No.:

In The

Supreme Court of the United States

MICHAEL A. SCOTT

Petitioner,

versus

HENRY COKE MORGAN, JR.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Petitioner Appearing Pro Se

1206P

QUESTIONS PRESENTED

1. Whether judicial immunity barred plaintiff's claims against the defendant federal judge?

2. Whether the district court erred in dismissing plaintiff's case?

PARTIES TO THE PROCEEDINGS

Plaintiff in the District Court:

Michael A. Scott

Defendant in the District Court

Henry Coke Morgan, Jr.

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Michael A. Scott, as *pro se*, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the dismissal by the United States District Court for the Eastern District of Virginia, Norfolk Division, of his case based on the doctrine of absolute judicial immunity.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit ("Court of Appeals") affirmed the United States District Court for the Eastern District of Virginia, Norfolk Division ("district court"), by unpublished per curiam opinion. The order of dismissal issued by the district court dismissed with prejudice all claims.

STATEMENT OF JURISDICTION

The judgment (App. A) of the Court of Appeals was entered on October 11, 2001. The judgment and Opinion and Order (App. B) of the district court were entered May 25, 2001 and May 24, 2001 respectively. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

Petitioner sets out the text of the following statutory provisions:

Supreme Court Rule 10.

Considerations Governing Review on Certiorari. Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although

neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Article III § 2 of the United States Constitution.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- To all Cases of admiralty and maritime Jurisdiction; -- to Controversies between two or more States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Original Jurisdiction Statute 28 U.S.C. § 1331.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Removal Statute 28 U.S.C. § 1441.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates.

Supplemental Jurisdiction 28 U.S.C. § 1367 (a).

(a) Except as provided in subsections (b) and (c) or expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Nonremovable Actions, 28 U.S.C. § 1445

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1-4

and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), may not be removed to any district court of the United States.

STATEMENT OF THE CASE

Petitioner Michael A. Scott ("plaintiff") filed a complaint on November 28, 2000 alleging violations of his rights under the United States Constitution, and under federal civil rights statutes. The respondent ("defendant") filed a motion to dismiss on January 29, 2001 asserting absolute judicial immunity. On February 22, 2001, plaintiff filed an amended complaint and the defendant moved to dismiss the amended complaint asserting absolute judicial immunity. The district court granted the defendant's motion to dismiss on May 25, 2001 and dismissed plaintiff's complaint and amended complaint with prejudice.

The thesis of plaintiff's allegations was that the defendant usurped executive branch power and used that power to improperly prosecute two indirect criminal contempt charges against him which resulted in payment of a fine and a six (6) month sentence of probation; and to investigate plaintiff for perjury and for violating Virginia law. The plaintiff further contended that the defendant joined, combined and conspired with defendants in a civil case removed from the state court, Scott XIII, and dismissed by the defendant in the clear and complete absence of all jurisdiction and in violation of the United States Constitution. Scott XIII was a case originally filed by plaintiff in the circuit court of the city of Virginia Beach, Virginia containing a garden variety of separate and distinct state law claims. The plaintiff also contended that the manner in which the defendant applied removal statute 28 U.S.C. § 1441 in Scott XIII violated the United States Constitution, and that § 1441 could not pass constitutional muster when applied to the Scott XIII case by the defendant thereby depriving him of the power and jurisdiction to remove the case from state court and adjudicate the state law claims.

The Scott XIII defendants raised for the first time in their notice of removal (App. F) that plaintiff's motion for judgment filed in state court alleged federal civil rights claims under the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. ("Title VII") and the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"). Giving the defendant the benefit of that assertion by the Scott XIII defendants, the remaining separate and distinct claims alleged in the motion for judgment were of a garden variety either constitutionally or statutorily beyond the limited jurisdiction of the district court.

REASONS FOR GRANTING THE WRIT

Plaintiff contended in the courts below that the defendant usurped federal executive branch power and used that power to prosecute two criminal contempt charges against him while unilaterally acting as judge, prosecutor and juror during both proceedings, which resulted in convictions; and the defendant used the same prosecutorial powers to investigate plaintiff for perjury and practicing law illegally in violation of Virginia law. Plaintiff also contended that the defendant dismissed the Scott XIII case removed from the state court with prejudice in the clear and complete absence of all federal court jurisdiction. In support of these contentions, plaintiff submits that the courts below impermissibly expanded the doctrine of judicial immunity to shield the defendant's usurped executive branch powers and his conduct dismissing the state law claims that were either statutorily or constitutionally barred, or prohibited by law established by this Court.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS OF THE COURTS BELOW ARE IN CONFLICT WITH OPINIONS OF OTHER COURTS OF APPEAL AND WITH THE OPINIONS OF THIS COURT.

If this Court takes, as it should when reviewing a case adjudicated on a motion to dismiss, the properly pleaded facts alleged in plaintiff's amended complaint as true, then the

defendant: 1) "initiated, charged and prosecuted a criminal contempt charge against the plaintiff" on July 10, 1998, Amended Complaint (App. C), ¶ 4; 2) "initiated a criminal contempt proceeding against plaintiff, charged plaintiff with criminal contempt of court and effected service of a show cause order on plaintiff" on July 8, 1999, Amended Complaint, ¶ 5; and 3) the defendant accused "plaintiff on August 26, 1999 and again on October 1, 1999 of perjury and of practicing law illegally" under Virginia law, and "improperly investigate[d] those charges" pursuant to improperly usurped prosecuting powers, Amended Complaint, ¶ 6. "In determining whether the act was judicial, we look to the nature of the function performed." King v. Myers, 973 F.2d 354 (4th Cir. 1992).

Now, the defendant in his Scott XIII order of dismissal (App. D) and at the second criminal contempt hearing during which the defendant's investigatory conduct originated made explicit statements indicating the precise nature and purpose of his investigatory conduct. After having made his finding that plaintiff was guilty of criminal contempt, the defendant proceeded to collect evidence to support malicious allegations of perjury and practicing law illegally under Virginia law. Specifically, the defendant stated: ". . . On that date, I will have Mr. Mungin subpoenaed to appear and testify to see if it amounts to perjury." *Transcript of Show Cause Hearing,* Civil Action No. 2:98cv180 (Scott X), August 26, 1999. Further, the defendant in his Order of Dismissal (App. D) in Civil Action No. 2:99cv1814 (Scott XIII) stated: "At the hearing the defendants presented a deposition of George Mungin that suggested that Scott had helped Mungin prepare his complaint for federal court. In light of this evidence, the Court continued the show cause hearing **so that it could determine whether Scott had perjured himself and whether he had practiced law illegally.**" *Order of Dismissal,* p. 5, Civil Action No. 2:99cv1814, April 7, 2000 (emphasis added). Only Virginia law could be determinative of whether plaintiff "practiced law illegally" in the Commonwealth of Virginia.

The defendant's own aforementioned statements, written and oral, evidences his combination and joinder with the Scott X defendants to initiate a criminal investigation of plaintiff and to investigate plaintiff for perjury and for practicing law illegally, both under the auspices of federal authority, neither of which was related to the court's guilty verdict of criminal contempt and subsequent judgment entered for same. These were not judicial acts, were not adjudicative, and, moreover, there was a clear absence of all jurisdiction in federal court for making any sort of determination or investigation of "whether Scott had perjured himself and whether he had practiced law illegally." *Id.* (Emphasis added).

Despite the district court's reverence for judicial immunity to cover these nonjudicial acts, this Court has been "quite sparing" in its recognition of the doctrine of absolute immunity, and has refused to extend it any "further than its justification would warrant." *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 811, 102 S.Ct. 2727, 2734, 73 L.Ed.2d 396 (1982). Given the defendant's own oral and written description of exactly what the nature, purpose and function of his investigatory conduct was, extending judicial immunity to shield such conduct could not be justified and the district court erred in doing so. If the defendant suspected that plaintiff committed perjury and practiced law illegally, he "had a duty to notify the proper authorities if he felt a crime was being committed in his courtroom." *Martinez v. Winner*, 771 F.2d 424, 435 (10th Cir. 1985). Rather than taking this route, the defendant usurped the power and authority of the "proper authorities" and used them to initiate a criminal investigation of plaintiff and to collect evidence in support of that investigation. This conduct was not judicial and was not an adjudication in any way. "Anytime an action taken by a judge is not an adjudication between parties, it is less likely that the act is a judicial one." *Cameron v. Seitz*, 38 F.3d 264, 271 (6th Cir. 1994) (citing *Morrison v. Lipscomb*, 877 F.2d 463, 466 (6th Cir. 1989)).

This Court's opinion in *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1879) is particularly instructive in this case. This Court held that a judge who excluded black citizens from juries could be held liable under the Civil Rights Act of March 1, 1875 (18 Stat. 335). The Court assumed that the judge was merely performing a ministerial function. Nevertheless, the Court went on to state that the judge would be liable under the statute even if his actions were judicial. In this case, it need not be assumed that the defendant performed a function normally performed by a federal prosecutor when he prosecuted the two criminal contempt charges against plaintiff. The Court of Appeals vacated the conviction because a prosecutor was not appointed to prosecute the charge. Plaintiff made this specific allegation in his complaint and amended complaint in support of his civil rights claims. Also, it need not be assumed that the defendant performed a function normally performed by a federal prosecutor when he used his federal authority to initiate a criminal investigation in order to determine "whether Scott had perjured himself and whether he had practiced law illegally." *Order of Dismissal*, p. 5, Civil Action No. 2:99cv1814, April 7, 2000 (emphasis added). The law established by the Court of Appeals in *United States v. Neal*, 101 F.3d 993 (4th Cir. 1996) unmistakably established that prosecution of crimes was not a judicial function. The law established by this Court in *Ex parte Virginia* over a century ago unmistakably impugns civil liability to a judge for nonjudicial conduct. Plaintiff's complaint and amended complaint were replete with allegations of prosecutorial, not judicial, conduct. Then how could power usurped from the executive branch by a judicial officer, power constitutionally preserved to federal prosecutors, fall within the ambit of judicial immunity?

A. The Doctrine Of Absolute Judicial Immunity Has No Application To And Cannot Shield The Defendant's Prosecutorial And Investigatory Misconduct.

i. The Show Cause Order

Rule 42 of the Federal Rules of Criminal Procedure prescribed the manner in which the show cause order that initiated the criminal contempt proceeding against plaintiff should have been handled. The Fourth Circuit Court of Appeals, in vacating and remanding the criminal contempt conviction, specifically found that the criminal contempt at issue was indirect contempt. *See* United States v. Scott, 2000 WL 779069, at *1 (4th Cir. June 19, 2000). Rule 42 states in pertinent part:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charge and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest.

Fed. R. Cr. Proc. 42. The defendant did not give the plaintiff oral notice of the criminal contempt charges in open court. No application for the show cause order was ever made because no prosecutor was appointed and the United States attorney was not involved with prosecuting the criminal contempt. And yet, the defendant initiated the criminal contempt charge, prepared the show cause order and had it served on the plaintiff by the U. S. Marshall, and then presented the show cause order to himself at the hearing.

None of this conduct was judicial in nature, but was more akin to being ministerial acts. In fact, the plain language of Rule 42 placed the responsibility for applying to the district court for the show cause order for indirect contempt on the prosecutor. The Court of Appeals noted that "Federal Rule of Criminal Procedure 42 preserves the historical distinction

between in-court and out-of-court contempt." *United States v. Neal*, 101 F.3d at 997 n.2. Therefore, "[t]he test to be applied is whether initiating accusatory processes such as criminal prosecutions . . . is a function normally performed by a judicial officer." *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984). The *Sevier* court concluded, as this Court should, "that it is not." Id. at 272. See also In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (judge initiates prosecution by acting as one-man grand jury); *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980), cert. denied 449 U.S. 1028, 101 S.Ct. 601, 66 L.Ed.2d 491 (1980) (judge selects and prepares the criminal charge and prepares the guilty plea form). "It is well settled that charging a defendant is a prosecutorial function, not a judicial function." *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993); *Lopez v. Vanderwater*, 620 F.2d at 1235. The purpose of the show cause order was to charge plaintiff with criminal contempt and Rule 42 plainly placed that responsibility on the prosecutor.

ii. Prosecution Of The Criminal Contempt

Although plaintiff raised several questions on appeal of the criminal contempt conviction that could have resulted in vacation of the conviction, the Court of Appeals, in vacating and remanding, only and specifically found that the district court, the defendant, erred by not appointing a prosecutor to prosecute the criminal contempt charge, *United States v. Scott*, 2000 WL 779069, *1 (4th Cir. June 19, 2000), unpublished opinion, on the ground that "[p]rosecution of crimes is not a proper exercise of the judicial function." *United States v. Neal*, 101 F.3d at 997. There is no doubt that the defendant usurped the power of a federal prosecutor and used that power to prosecute the criminal contempt charge against plaintiff, an act which took his conduct beyond that recognized in law as being judicial in nature. "Because the district judge [the defendant] investigated the incriminating facts through extrajudicial means, introduced evidence against [Scott], and otherwise presented the Government's case, he improperly assumed a prosecutorial role." *United States v. Neal*, 101 F.3d

at 998. When a judge acts in nonjudicial capacity he pro tanto loses absolute judicial immunity. *McCray v. State of Maryland*, 456 F.2d 1 (4th Cir. 1972).

The acts for which plaintiff attempted to hold the defendant liable were not judicial acts subject to absolute judicial immunity, but rather were prosecutorial acts taken in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 1105, 35 L.Ed.2d 331 (1978). The plaintiff acknowledges that there were facts integrally related in an unbroken chain of events that actually and proximately caused his injuries, some of which were subject to absolute judicial immunity and some of which were not. Plaintiff disputes the district court's finding that the "July 1998 contempt citation appears to have involved direct contempt." *Opinion and Order*, p. 6. In a case analogous in several important respects to this case, *Lopez v. Vanderwater*, *supra*, that court specifically rejected the defendant judge's defense of absolute judicial immunity to prosecutorial conduct based on similar facts while finding certain conduct of the judge, the arraignment, conviction and sentencing, to be absolutely immune from liability. In doing so, the Lopez court found:

> The irregular arraignment, conviction, and sentencing were not, however, the only acts of Vanderwater that proximately caused Lopez' injury. Vanderwater acted as prosecutor. He determined the offense to be charged . . . He prepared a written charge on the "Notice to Appear" form . . . These acts were not functions normally performed by a judge. They were not, therefore, judicial acts, and are not, as a consequence, protected by judicial immunity.
>
> * * * *
>
> These prosecutorial acts by Vanderwater were both the actual and the proximate cause of several violations of Lopez' constitutional rights.

Lopez v. Vanderwater, 620 F.2d at 1235 (citations omitted) (emphasis added). In *King v. Myers*, *supra.*, the Court of Appeals acknowledged the Lopez principles with approval. Of course, the defendant "has not claimed prosecutorial immunity and is obviously not entitled to it because he was not a prosecutor." *Lopez v. Vanderwater*, 620 F.2d at 1237, n. 17. But for determining the criminal contempt charge, initiating the criminal contempt charge, and prosecuting the criminal contempt charge, the two convictions of criminal contempt and sentencing for same would not have occurred. Like the *Lopez* defendant, this defendant should be held liable for his naked prosecutorial acts unencumbered by immunity of any kind. *See International Union, UMWA v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 2563, 129 L.Ed.2d 642 (1994) (Scalia, J., concurring) (noting that the idea "[t]hat one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers").

The district court concluded that the prosecutorial conduct of the defendant was a procedural error and was still subject to judicial immunity, citing *Stump v. Sparkman*, *supra.* The district court also concluded that citing a litigant for contempt was a normal judicial function, citing *Malina v. Gonzales*, *supra*. The basic problem with the district court's reasoning was that the defendant assumed the role of judge, prosecutor and juror during the contempt proceedings. Plaintiff readily acknowledges that the defendant's conduct as judge and juror may have been subject to judicial immunity, but the conduct as prosecutor was not subject to judicial immunity in accord with *Lopez v. Vanderwater*. But for prosecuting the contempt charges, the conviction and sentencing would not have occurred. The district court failed to take into consideration the undisputed fact that federal district courts are courts of limited jurisdiction. Both *Stump v. Sparkman* and *Malina v. Gonzales* involved judges of courts of general jurisdiction. Congress in Rule 42 defined the defendant's authority and jurisdiction with regard to citing a litigant for contempt. And the Court of Appeals in *United*

States v. Neal, supra, construed Rule 42 as stripping the defendant of any discretion, authority or jurisdiction to prosecute an indirect contempt. Therefore, citing a litigant for indirect contempt was not within the discretion, authority or jurisdiction of the district court and, by extension, the defendant. The district court's reliance on *Malina v. Gonzales* in this regard was misplaced.

The district court further concluded, with which plaintiff agrees, that "A judge's immunity from suit is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity." *Opinion and Order,* p. 6 (citing *Mireless v. Waco,* 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d (1991)). Notwithstanding plaintiff's numerous allegations that the defendant prosecuted the two indirect contempt charges, the district court, contrary to established principles that required the properly pleaded facts to be accepted as true when considering a motion to dismiss, clearly made findings of fact that the defendant "was on the bench and acting in his official capacity as a judge" and that the "July 1998 contempt citation appears to have involved direct contempt." *Opinion and Order,* p. 6. Both of these specific findings by the district court were inconsistent with allegations of plaintiff's amended complaint. Plaintiff plainly alleged that the defendant acted as a federal prosecutor and prosecuted both indirect contempt charges without authority or jurisdiction. There is ample case law authority on the books from circuit courts of appeal denouncing the prosecution of crimes as being within the ambit of a judge's duty.

The district court failed to distinguish the role of each the judge, prosecutor and juror that made up the adversary indirect contempt proceeding. Evidence was taken by the defendant and presented by the defendant to himself. Upon consideration of that evidence, the defendant convicted plaintiff of criminal contempt twice. The district court apparently adopted the absurd reasoning that plaintiff's allegations of prosecuting and investigating misconduct by the

defendant, and the defendant's role as judge and juror were all a distinction without a difference. The district court's look beyond the pleadings to find that the defendant "was on the bench and acting in his official capacity as a judge" and that the "July 1998 contempt citation appears to have involved direct contempt" deprived plaintiff of the right to present evidence to the contrary and discover evidence, thus depriving him of due process and equal protection in the instant case.

Rule 42, the United States Constitution, and the Court of Appeals opinion in *United States v. Neal, supra,* expressly deprived the defendant of the authority, jurisdiction and judicial discretion to prosecute an indirect contempt charge. "[I]n the face of clearly valid statutes or case law depriving him of jurisdiction," *O'Neil v. City of Lake Oswego,* 642 F.2d 367, 369 (9th Cir. 1981), to prosecute the indirect contempt charge, the defendant could not have committed a procedural error. The district court cited from *Stump v. Sparkman,* 435 U.S. at 359, 98 S.Ct. at 1106: "A judge is immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." The district court misapplied the intent of this passage from the *Stump v. Sparkman* opinion which involved a judge of a court of general jurisdiction whose acts were not limited or abrogated by established statutes or established case law precedent. Nevertheless, in the course of holding immune an Indiana judge who ordered an unconsented sterilization, the *Stump v. Sparkman* court actually implied that had an Indiana statute or case prohibited the trial court from considering a sterilization petition, immunity would have been denied. 435 U.S. at 358, 98 S.Ct. at 1105. As stated above, there were three compelling authorities that deprived the defendant of authority, jurisdiction and discretion to prosecute an indirect contempt charge. The defendant could not have been performing a "judicial act" when he prosecuted the contempt charges. The United States Constitution draws a bright line separating the power of the federal judiciary from that of the executive branch and any suggestion that the defendant committed a procedural error when he usurped the executive branch powers to

prosecute the contempt charges flies-in-the-face of common sense, settled law of Circuit Courts of Appeal and the Constitution.

The district court stated:

> "It is fundamental that courts possess an inherent power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates and that they are vested with the power to initiate contempt proceedings to ensure that the judiciary is not utterly dependent upon the other branches of government to vindicate judicial authority." *Opinion and Order*, p. 6, citing *Neal*, 101 F.3d at 996.

Plaintiff does not dispute this conclusion of law with respect to direct contempt. However, the issue here was indirect contempt and the *Neal* court expressly imposed upon the district court and, by extension, the defendant dependence "upon the other branches of government to vindicate judicial authority" for indirect contempt because direct and indirect contempt are fundamentally different with the latter invoking the requirement for normal adversarial criminal trial procedures. In order to effectuate vindication of his judicial authority, the defendant usurped the power of "the other branches of government" and, in the clear and complete absence of all jurisdiction, used that wrongfully usurped power to prosecute both criminal contempt charges against plaintiff. Any attempt to broadly construe the absolute immunity doctrine to include the defendant's prosecutorial conduct and find that such conduct was a mere procedural error flew-in-the-face of Court of Appeals precedent articulated by the *Neal* court.

iii. The Investigatory Conduct

At the conclusion of taking evidence during the first day of the second criminal contempt proceeding, this defendant undertook a course of action the purpose of which was to investigate the plaintiff in combination and conspiracy with the Scott X defendants to collect evidence about whether the plaintiff committed perjury and violated Virginia law. Yet again, the defendant had improperly assumed the role of a prosecutor and the authority that attaches with that position to investigate possible crimes. The issue being investigated was not whether the plaintiff had practiced law before the district court without a license, as the defendant contended, but rather whether the plaintiff had provided legal assistance to George Mungin away from any court of any kind and did so for a fee in violation of Virginia law, Code of Virginia § 54.1-3904. In other words, whether the plaintiff had assisted George Mungin with the preparation of legal documents that George Mungin later filed pro se with the district court on his own behalf, and whether plaintiff was paid in any manner for doing so. The issue of perjury was intertwined with and arose from the defendant's attempt to collect evidence as to whether the plaintiff had violated Virginia law.

Indeed, it was the Scott X defendants who, weeks earlier, had already initiated an investigation of their contention that plaintiff had violated Virginia law by providing legal assistance to George Mungin. The Scott X defendants accomplished this by taking deposition testimony of George Mungin in advance of the criminal contempt proceeding regarding their contentions. The Scott X defendants submitted the deposition testimony to the defendant during the criminal contempt proceeding. The defendant did no less than piggyback onto an ongoing investigation initiated by the Scott X defendants on their own malicious volition. The defendant had no discretion, authority or jurisdiction to join and combine with the Scott X defendants to investigate and collect evidence about whether plaintiff committed perjury or violated Virginia law and these acts were not "garden variety judicial functions" and bore no relation to the indirect contempt proceeding. Indeed, the defendant found plaintiff guilty of criminal

contempt several weeks before he completed the improper criminal investigation. Investigations into violations of Virginia law lies with Virginia state authorities, not with federal courts and federal judges. Therefore, the defendant's investigation of plaintiff for perjury and for violating Virginia law was performed by him in a federal court room in the complete and clear absence of all jurisdiction. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816, 107 S.Ct. 2124, 2142, 95 L.Ed.2d 740 (1987) (Scalia, J., concurring in judgment) (emphasizing that the judicial power "does not include the power to seek out law violators in order to punish them-which would be quite incompatible with the task of neutral adjudication").

B. Federal Removal, Personal And Subject Matter Jurisdiction Over Plaintiff's Motion For Judgment Filed In The State Court Was Barred By Federal Statute.

The defendant's order of dismissal makes clear that he was well aware of the relationship between plaintiff and the Scott XIII defendants after having presided over numerous cases between them. The defendant was also aware that Norfolk Southern Corporation ("NS") was a railroad company and that plaintiff had worked for that corporation continuously from 1985 to 1996.

The defendant, after adopting the Scott XIII defendants' concocted and specious assertions that plaintiff's motion for judgment (App. E) alleged claims under Title VII and Section 1981 based on certain allegations of discrimination, harassment and retaliation in the motion for judgment, completely ignored plaintiff's separate and independent personal injury and contract claims alleged in paragraphs 10 & 11. It was abundantly clear plaintiff alleged that he "sustained an injury at work which resulted in decreased vision in his right eye." *Motion for Judgment*, ¶ 10. In connection with that injury, plaintiff alleged that NS breached agreements it made with him. Both the injury and

contract claim were claims that should only have been and could only have been construed under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq., without any relation to the Scott XIII defendants alleged Title VII and Section 1981 claims. Moreover, that FELA claim has never been the subject of any litigation in any court. In addition, the defendant also ignored that the same allegations relied on for the Title VII and Section 1981 claims also supported a claim under the FELA. See *Andricola v. National R.R. Passenger Corp.*, 745 F.Supp. 311 (E.D.Pa. 1990); *Fox v. Norfolk & Western Ry. Co.*, 755 F.Supp. 265 (E.D.Mo. 1991). "A civil action in any State court against a railroad" arising under the FELA "may not be removed to any district court of the United States." 28 U.S.C. § 1445 (a) (emphasis added). Section 1445 (a) prohibited removal jurisdiction even though Scott XIII involved federal questions like those concocted by the defendants in that case. *Great Northern Railway Co. v. Alexander, Administrator of Hall*, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918); *Brown v. National Railroad Passenger Corporation*, 725 F.Supp. 873 (D.Md. 1989); *Loftus v. The Delaware and Hudson Railroad Corp.*, 122 F.Supp. 829 (M.D.Pa. 1954).

Inclusion of the FELA claims in the motion for judgment effectively gave the state court exclusive jurisdiction over the entire "civil action" irrespective of the Scott XIII defendants injected federal claims, foreclosed its removal to federal court and foreclosed federal court jurisdiction. "[W]hen a judge . . . acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost." *O'Neil v. City of Lake Oswego*, 642 F.2d at 369. There can be no doubt that § 1445 (a) expressly deprived the federal court of jurisdiction over the "civil action" involving the FELA claim since it was initially filed in the state court. As this Court stated, "[b]efore it can be concluded that such jurisdiction exists, a federal court must satisfy not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." Aldinger v. Howard, 427 U.S. 1, 96

S.Ct. 2413, 2415, 49 L.Ed.2d 276 (1976). While Article III may permit a federal court to have jurisdiction over an FELA claim, Congress did expressly in 28 U.S.C. § 1445 (a) and by implication, negate the existence of removal jurisdiction of a "civil action" filed in state court that included a claim under the FELA effectively giving the state court exclusive jurisdiction under the narrowly defined condition stated in 28 U.S.C. § 1445 (a). Implicit in § 1445 (a) is the negation of federal court personal and subject matter jurisdiction over the entire "civil action." Without removal jurisdiction, the district court could not acquire jurisdiction over the parties and, consequently, the defendant's action dismissing the motion for judgment with prejudice occurred in the clear and complete absence of all jurisdiction. "The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978).

The defendant's *sua sponte* dismissal of the motion for judgment without hearing from the parties on the garden variety of claims and allegations contained in the motion for judgment placed him at the perils of his own action. "[A] judge who undertakes to act in an area where he has no subject matter jurisdiction is denied absolute immunity." *King v. Myers*, 973 F.2d 354, 357 (4th Cir. 1992) (citations omitted).

The State Law Claims Alleged In The Motion For Judgment And Dismissed By The Defendant Were Beyond The Reach Of Federal Court Removal, Original And Supplemental Jurisdiction.

Plaintiff urges this Honorable Court to focus on the distinction between dismissal on the merits, as occurred with Scott XIII, and a dismissal for want of jurisdiction or remand, as should have occurred in Scott XIII. This distinction is critical to plaintiff's argument because when the defendant dismissed Scott XIII with prejudice, he fouled the constitutional bound established by Article III, § 2 and this

Court's precedent foreclosing the district court's exercise of power to adjudicate state law matters that could find no independent basis for federal jurisdiction. The courts below apparently presumed that the type of dismissal was unimportant to the issue of the removal statutes conferring on the district court authority to adjudicate the merits of unrelated, separate and distinct state law claims included in the same complaint with the purported federal claims alleged by the Scott XIII defendants. Moreover, the district court refused to examine this issue and the Court of Appeals, in affirming the district court's dismissal, sanctioned its refusal to examine this critical issue and thus sanctioned the district court's denial of plaintiff's due process and equal protection rights in this regard.

It was necessary for the defendant to examine each of the state law claims alleged in the motion for judgment to determine whether each was within the jurisdiction of the federal court. Interestingly, the defendant made absolutely no analyses or findings regarding the specific removal statutes the Scott XIII defendants alleged as a basis for removal jurisdiction in their notice of removal (App. F). The defendant made absolutely no analysis or finding with regards to pendent claims, pendent parties, separate and independent claims, or the like. Indeed, the defendant never once mentioned the federal removal and jurisdictional statutes in his order of dismissal (App. D). "The [Order of Dismissal] of the District Court shows that it really considered the merits of the case in reaching the conclusion that it [had jurisdiction]. As this court has not infrequently said, jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked." *Flanders v. Coleman,* 250 U.S. 223, 39 S.Ct. 472, 474 (1918). The defendant's order of dismissal made clear that no "consideration of the grounds upon which federal jurisdiction [was] invoked" by the Scott XIII defendants was made by the defendant. Id.

The defendant only focused on previous Scott cases to find support for federal court jurisdiction and plaintiff submits that that was the wrong approach for determining whether Article III, § 2 permitted federal court adjudication of the unrelated state law claims in Scott XIII in the face of his vehement challenge to federal court jurisdiction. In doing so, the defendant relied on *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) to stand for the proposition that the district court could take jurisdiction over Scott XIII upon its removal from state court. The defendant concluded that the "facts in Scott XIII are similar in important respects to those presented to the Supreme Court in Moitie." *Defendant's Order of Dismissal*, pp. 14-15. There were very significant and substantial differences between *Moitie* and Scott XIII. First, the plaintiffs in *Moitie* re-filed the identical complaint that had been dismissed by the federal court in the state court but alleged only state law claims. Only a single complaint containing the same factual allegations and claims sharing a common nucleus of operative fact was at issue. In Scott XIII, although plaintiff does not agree, the defendant clearly found that plaintiff's claims were from several previous Scott cases: "The allegations in Scott XIII involve, for the most part, the same parties, the same alleged offenses, and the same time periods as did Scott IV, Scott VI, Scott IX, and Scott XI," and Scott X. *Defendant's Order of Dismissal*, p. 15. Second, the federal claims that the *Moitie* court dismissed shared a common nucleus of operative fact with the state claims re-filed in the state court. In Scott XIII, it was impossible to draw such a conclusion and none of plaintiff's state law claims shared a common nucleus of operative fact with the Title VII and Section 1981 claims, except the contract claim relying on the same facts as those federal claims.

While the Scott XIII defendants raised the federal issues, not all of them were entitled to rely on those federal issues for removal of the case against them from state court. The defendant, having provided a detailed analysis of previous Scott cases in his order of dismissal, was and should have been aware that not all of the Scott XIII defendants were entitled to

rely on the Title VII and Section 1981 claims for removal. The conduct giving rise to the alleged Title VII and Section 1981 claims occurred prior to February 16, 1996 and many of the Scott XIII defendants had absolutely no relationship with those allegations cited by the Scott XIII defendants, nor could they since some of the Scott XIII defendants were not even employees of NS or located anywhere near the location where the conduct was alleged to have occurred. Thus, absent any relation to the alleged Title VII and Section 1981 claims, the defendant could not acquire personal jurisdiction over those half dozen or more Scott XIII defendants under any theory. A judge who acts in the clear and complete absence of personal jurisdiction loses his judicial immunity. *Duba v. McIntyre*, 501 F.2d 590, 592 (8th Cir. 1974) ("the judge must have both jurisdiction over the person and the subject matter if he is to be immune from suit."); *Ryan v. Scoggin*, 245 F.2d 54, 58 (10th Cir. 1957) (judge is immune for order or judgment when "court has jurisdiction of the subject matter and of the parties"); *Bradley v. Fisher*, 80 U.S. 335, 352 (1871).

The Scott XIII case involved four separate and distinct state law causes of action, each of which had its own nucleus of operative fact separate and distinct from the other: two Contract claims, Collection claims, and Contempt Hearing claims. There was also a request for declaratory relief that had no relation whatever to the alleged Title VII and Section 1981 claims. The Supreme Court has made abundantly clear that a federal court's first duty in a case is to determine whether it has jurisdiction to adjudicate the issues presented.

> "This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. On every writ of error or appeal, the first and fundamental question is that of jurisdiction,

> first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception."

Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 101-102, 118 S.Ct. 1003, 1013, 140 L.Ed.2d 210 (1998) (citations omitted). Without jurisdiction over the separate and independent state law claims unrelated to the alleged Title VII and Section 1981 claims, the defendant was without "power to declare the law" with respect to those state law claims, but rather could only have ordered their remand to the state court. The Supreme Court held that Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case. "For a court to pronounce upon [the merits] when it has no jurisdiction to do so," *Steel Co.* declared, "is for a court to act ultra vires." If the defendant had adhered to this rudimentary principle in Scott XIII, he would have clearly found that the district court was without personal and subject matter jurisdiction to "pronounce upon the merits" of the unrelated state law claims requiring their remand back to the state court from where they were removed.

The defendant and the district court appear to have assumed that the district court could exercise jurisdiction over the unrelated claims and parties simply because they were part and parcel of the same motion for judgment. This Court has clearly cautioned against this approach.

> "But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a

> federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground; in the latter it may not do so upon the *nonfederal* cause of action."

Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 587, 589 (1933) (emphasis in original); *See also* Siler v. Louisville & Nashville Railroad Co., 213 U.S. 175, 29 S.Ct. 451 (1909); and Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1973). Quite simply, in the Scott XIII case, separate and distinct sets of "operative facts" surrounded the state and federal claims, one set of facts was relevant only to the Scott XIII defendants alleged Title VII and Section 1981 claims interlocked with the alleged state law contract claims, the others only to the remaining separate and distinct state law claims.

Nevertheless, the problem with federal jurisdiction flowed from the Scott XIII defendants and the defendant's reliance on 28 U.S.C. § 1441 (b) and (c) and the Scott XIII defendants acknowledgment in their notice of removal and the defendant's acceptance that the motion for judgment "sets forth separate and independent claims of a civil nature." Removal from state court pursuant to Section 1441 (b) allows federal courts to exercise jurisdiction over pendent state law claims. Thus, removal of the entire case from the state courts would be proper only if the state and federal claims "derive from a common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Because the Scott XIII defendants readily acknowledged and the defendant accepted that plaintiff's

motion for judgment "sets forth separate and independent claims of a civil nature," those claims could not also have been pendent to the "arising under" jurisdiction of the Title VII and Section 1981 claims for purposes of § 1441 (b).

Plaintiff submits that because the Scott XIII defendants raised the federal issues in that case predicated on the same factual transactions supporting one of his state law contract claims and FELA claims, there were no "separate and independent claims of a civil nature" from which the alleged Section 1981 and Title VII claims could be distinguished. For the plaintiff's state law contract claim was interlocked in the same transactions with the alleged Title VII and Section 1981 claims for the purposes of § 1441 (c). Ironically, the Court of Appeals in *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836, 848, n. 12 (4th Cir.), while interpreting the *Gibbs* and *Hurn* standards found "pendent jurisdiction in terms of the claims an individual plaintiff would ordinarily be expected to try in one lawsuit and thereby impliedly rejects any contention that pendent jurisdiction can exist over separate claims of separate plaintiffs." Plaintiff's motion for judgment raised a garden variety of "separate claims" and he was certainly not "ordinarily expected to try [them] in one lawsuit." Id.

The defendant cannot argue that the plaintiff also had a state law contract claim supported by the same facts that were completely interlocked with the Scott XIII defendants alleged Section 1981 and Title VII federal claims. For this reason, the defendant could not rely on § 1441 (c) as a basis for removal jurisdiction. On the other hand, the remaining separate and independent state claims prevented the defendant's reliance on § 1441 (b) for removal jurisdiction. In *American Fire & Casualty v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951), the Supreme Court stated: "where there is a single wrong to a plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim under § 1441 (c)." The Scott XIII defendants reliance on the same facts for their "arising under" jurisdiction assured that the Title VII and Section 1981 claims

were interlocked with one of the state law contract claims essentially foreclosing removal of "the entire case" pursuant to § 1441 (c) under *Finn's* one fire rule. 28 U.S.C. § 1441 (c). Because of the presence of several separate and independent claims distinct from the alleged Title VII and Section 1981 claims, the "civil action" could not be removed pursuant to § 1441 (a) or § 1441 (b) under the *Gibbs* common nucleus of operative fact rule and under 28 U.S.C. § 1367.

In any event, there was even a more fundamental constitutional reason why removal jurisdiction did not exist under § 1441 (c). Assuming for the moment that removal of the entire case from state court was proper under § 1441 (c), for the defendant to have taken jurisdiction over the federal causes and the unrelated state causes raised the question of whether Article III permitted adjudication of the unrelated state causes that could find no independent justification for federal personal and subject matter jurisdiction under any of the items listed in Article III § 2 of the United States Constitution. Plainly stated, the plaintiff's state court case was broader in scope than the cases a federal court was permitted to completely adjudicate under Article III. Accordingly, if § 1441 (c) is viewed, upon an entirely straightforward reading of its plain language, as authorizing removal and adjudication of plaintiff's entire state court case, then § 1441 (c) purports to empower the district court to undertake an unconstitutional act. *See Cedillo v. Valcar Enters. & Darling Delaware Co.*, 773 F.Supp. 932, 935 n. 3 (N.D.Tex. 1991) (noting the "potentially troublesome" constitutional issues raised by Section 1441 (c)); *Moralez v. Meat Cutters Local 539*, 778 F.Supp. 368, 370, n. 2 (E.D.Mich. 1991); see also 44A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3724, at 402-03 (2d ed. 1985 ("Yet another problem . . . is whether Section 1441 (c) is constitutional in federal question cases."); and 28 U.S.C. § 1441 Commentary at 5.

The problem with jurisdiction over the unrelated state claims and unrelated parties after their removal pursuant to § 1441 (c) was that this provision conferred judicial power and

jurisdiction in excess of the limit specifically set forth in Article III § 2. The posture of Scott XIII was such that it could not have been originally filed in federal court because original jurisdiction was lacking. The defendant determined that "[i]f an action is based on the same series of events or transactions as previously litigated, then the district court has jurisdiction continuing from its jurisdiction in the prior litigation." Defendant's Order of Dismissal, p. 15. This determination by the defendant was erroneously applied to the Scott XIII motion for judgment which contained a garden variety of separate and distinct state law causes of action thereby expanding federal court jurisdiction in a manner beyond that conferred by Congress and the Constitution.

> The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give the district courts power the Congress has denied them.

American Fire & Casualty v. Finn, 71 S.Ct. at 542.

It was the supplemental jurisdiction statute, 28 U.S.C. § 1367, which should have determined whether the defendant had jurisdiction to adjudicate the totally unrelated claims and parties. And § 1367 leaves no doubt that the supplemental claims and parties must be "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367 (emphasis added). "Statute defining district court's supplemental jurisdiction applies with equal force to cases removed to

district court and cases initially filed there." *City of Chicago v. Intern. College of Surg.*, 118 S.Ct. 523. The unrelated state law claims were not so related to the Scott XIII defendants' alleged Title VII and Section 1981 claims. As aforementioned, it was factually and legally impossible for certain of the Scott XIII defendants to have been subject to the alleged Title VII and Section 1981 claims relied on for original jurisdiction under 28 U.S.C. § 1331. The specific language relied on by the Scott XIII defendants as giving rise to the Title VII and Section 1981 claims all occurred prior to February 16, 1996, the date plaintiff's employment ended with NS. And § 1367 makes plainly clear that the supplemental claims and parties must be "related to claims in the action within such original jurisdiction" or, in other words, derive from a common nucleus of operative fact with the Title VII and Section 1981 claims in Scott XIII, not with the claims of other Scott cases to which the defendant clearly looked to find supplemental jurisdiction.

The only claims in the Scott XIII case that were alleged by those defendants to have derived from a common nucleus of operative fact arose prior to February 16, 1996. Any and all of the state law claims alleged in the motion for judgment that arose after February 16, 1996 (and in all cases the claims arose well after this date) could not possibly have been "related to claims in the action within such original jurisdiction." The defendant was constitutionally and statutorily restricted by Congress and settled case law precedent to only consider the state law claims as pendent to the Scott XIII defendants alleged Title VII and Section 1981 claims that were predicated on conduct alleged to have arisen prior to February 16, 1996.

The defendant, in his order of dismissal for Scott XIII, clearly did rely on other matters and Scott cases not "in the [Scott XIII] action" to erroneously support removal, personal and subject matter jurisdiction. To the extent that the defendant considered other federal claims or matters not "in the [Scott XIII] action" to support removal, personal and subject matter jurisdiction, such an approach was neither statutorily

nor constitutionally authorized. Congress, expressly in 28 U.S.C. § 1367 and by implication, negated the existence of federal jurisdiction over supplemental claims not "related to claims in the action within such original jurisdiction." The portion of § 1367, "claims in the action", necessarily bound and restricted the defendant to only the pleadings in Scott XIII and did not give the defendant the green light to "look beyond the pleadings", *Defendant's Order of Dismissal*, p. 14, to claims in other Scott cases to find some way to support federal jurisdiction in order to dismiss that case on behalf of his co-conspirators. The defendant, in taking jurisdiction over the unrelated state claims and adjudicating same in a manner inconsistent with federal laws, statutes and Article III, did not merely act in excess of jurisdiction, but rather in the clear and complete absence of all jurisdiction, including removal, personal and subject matter jurisdiction.

The defendant placed great weight on his "finding that the allegations in Scott XIII involved for the most part, the same parties, the same alleged offenses, and the same time periods as four prior lawsuits filed by plaintiff in federal court" and that this finding rendered "plaintiff's motion to remand . . . moot." *Def. Mot. to Dism. Br.* at 4. The defendant can take no comfort in this assertion since it put the cart before the horse with regard to federal removal, personal and subject matter jurisdiction. In making a determination of federal removal, personal and subject matter jurisdiction, the removal statutes, supplemental jurisdiction statute and Article III of the United States Constitution restricted federal jurisdiction in Scott XIII. With regard to the unrelated state law claims in that case, the defendant could not look to the "four prior lawsuits filed by plaintiff in federal court" because the "claims in the action" language included in § 1367 restricted consideration to only the claims in the pleadings (or motion for judgment) in Scott XIII for making a determination of whether federal jurisdiction existed over those claims.

The defendant was statutorily prohibited from considering anything about the "four prior lawsuits" when

determining whether the district court had supplemental jurisdiction under § 1367. There was no way for the defendant to have had supplemental jurisdiction over plaintiff's unrelated state law claims in Scott XIII because they were not related to the "claims in the action [Title VII and Section 1981] within such original jurisdiction that they form[ed] part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367 (emphasis added). The Court of Appeals has explained that "Federal courts are courts of limited jurisdiction and are empowered to act only in those specific instances authorized by Congress." *Bowman v. White*, 388 F.2d 756 (4th Cir. 1968); *Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61 (4th Cir. 1988). Federal court jurisdiction over the separate and distinct state law claims in the motion for judgment did not exist under any of the statutes authorized by Congress because they did not meet the "common nucleus of operative fact" standard set forth in *Gibbs, supra.*

The import of this Court's decision in *Gibbs, supra,* and *Hurn, supra,* impliedly prohibits a federal court from adjudicating claims and parties whose involvement in the suit is totally unrelated to the purported "case or controversy" providing for federal jurisdiction in a manner consistent with Article III. This bedrock principle is particularly important in the context of removal of a case from state court. The decision whether to remove a case to federal court directly implicates the constitutional distribution of judicial power between federal and state courts. *See Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 247, 90 S.Ct. 1583, 1590, 26 L.Ed.2d 199 (1970) ("[T]here is no indication that Congress intended by the removal mechanism to effect a wholesale dislocation in the allocation of judicial business between the state and federal courts."). To the extent that the defendant adjudicated the separate claims not sharing a "common nucleus of operative fact" with the Scott XIII defendants alleged Title VII and Section 1981 claims, such adjudication exceeded this district court's Article III power and, thus, was unconstitutional. At a minimum, the unrelated state law claims

and parties should have been remanded back to the state court from where they were removed without reaching the merits. *Finley v. United States*, 490 U.S. 545, 547-48, 109 S.Ct. 2003, 2006, 104 L.Ed.2d 593 (1989) (noting that a federal court cannot exercise jurisdiction absent both constitutional and statutory authorization).

A plain reading of the supplemental jurisdiction statute leaves no doubt that claims which are not "so related to the claims" providing for federal jurisdiction are clearly beyond the statutory reach of supplemental jurisdiction and beyond the jurisdiction prescribed by Article III § 2 which, by the way, is quite consistent with *Hurn, supra,* and *Gibbs, supra.* See also *Pacific Railroad Removal Cases*, 115 U.S. 1, 5 S.Ct. 1113, 29 L.Ed. 319 (1885) (A condemnation action was brought against a number of land owners. One defendant, a federal corporation, removed its controversy because it presented a federal question. And the Court held that the controversy as to the removing defendant was a "suit" itself, distinct and separate from the others, and the other defendants were left in the state court). Since the Scott XIII defendants were intent on removing the case from the state court to federal court, at best, giving the defendant the utmost liberal application of the doctrine of judicial immunity, there could only have been bifurcation of the Scott XIII case between the federal court on the Scott XIII defendants alleged Title VII and Section 1981 claims and the state court on the unrelated state law and FELA claims that were completely beyond the jurisdiction of the district court.

The plaintiff has already provided plenary reasons why the defendant adjudicated the Scott XIII case in the clear and complete absence of all jurisdiction, and that such adjudication of the totally unrelated state law claims was unconstitutional. While there was a pendent state law contract claim to the Scott XIII defendants' alleged Title VII and Section 1981 claims, the remaining state law claims were entirely "separate and independent". Reliance on 28 U.S.C. § 1441 (b) for removal jurisdiction actually conflicted with

reliance on 28 U.S.C. § 1441 (c) as removal jurisdiction should be "or" and not "and" as alleged by the Scott XIII defendants in their notice of removal. In any event, assuming removal of the Scott XIII case could be had, such removal could only be had pursuant to 28 U.S.C. § 1441 (c). To the extent that the defendant adjudicated the unrelated state claims after their removal under 28 U.S.C. § 1441 (c), the adjudication was unconstitutional and in direct conflict with the conclusions of courts of appeal on the same important point of law.

> All jurisdictional difficulties, occasioned by the removal of the entire action, are dissolved in the federal court by its power to dismiss or remand all non-removable issues or controversies as justice requires. It has no power to adjudicate such separate and independent claims or issues not arising from the same transaction or from an interlocked series of transactions.
>
> A literal construction of Section 1441 (c) of Title 28 of the United States Code might render a part of the paragraph unconstitutional. While it provides for the removal of the entire case, and that the federal court may determine all issues therein, it contemplates the dismissal or remand for want of jurisdiction of all non-removal issues and controversies which constitute separate and independent claims or causes of action not arising out of the same transaction or from a related series of transactions.

Finn v. American Fire & Casualty Co., 207 F.2d 113, 116 (5th Cir. 1953) (emphasis added). *See also* *Tillman v. Russo Asiatic Bank*, 51 F.2d 1023 (2nd Cir. 1931); Hoffman v. Lynch, 23 F.2d 518; *Henry v. Independent American Sav. Ass'n.*, 857 F.2d 995, 999 (5th Cir. 1988).

Plaintiff has already stated above this Court's rudimentary principle regarding the district court's first duty of determining whether it has jurisdiction over the causes presented in the Scott XIII case. This principle faithfully adhered to could only have led to the remand of the unrelated state claims to the state court from where they were removed. The posture of the Scott XIII case required, at a minimum, bifurcated litigation in both federal court and state court, or a complete remand, as a matter of law, and giving the defendant an extremely liberal application of the judicial immunity doctrine. And further, when the defendant did otherwise, he thwarted the settled principle articulated by this Court in a venerable line of cases that federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger, supra.* "[I]mmunizing judges from liability when they rule on matters belonging to categories which the law has expressly placed beyond their purview can lead only to unprincipled decisions." *O'Neil v. City of Lake Oswego*, 642 F.2d at 370.

C. The Defendant Violated Article III § 2, The Ninth Amendment And The Tenth Amendment

The defendant's dismissal of plaintiff's motion for judgment violated not only Article III, but also the Ninth Amendment and the Tenth Amendment. The posture of plaintiff's motion for judgment was such that a federal court lacked even removal jurisdiction. Plaintiff has already stated above the reasons why removal jurisdiction under § 1441 should have failed. Exclusive state court jurisdiction over plaintiff's state law claims was plainly supplanted in the Tenth Amendment, and both their removal from state court and adjudication by the defendant violated this Amendment. Interestingly, the district court, in granting the defendant's motion to dismiss expressly declined to review whether the defendant had improperly adjudicated the motion for judgment, but instead found that the defendant's actions were proper and authorized under § 1441 (b) and § 1441 (c). The defendant had no such authorization under those removal statutes under *Gibbs, supra,* and *Finn, supra.* In § 1441 (b) and § 1441 (c), Congress authorized that

which had been prohibited by Article III § 2 and the Tenth Amendment. In other words, to the extent those removal statutes were applied in Scott XIII by the defendant to support its removal from state court and federal court adjudication, both statutes authorized unconstitutional acts and, by extension, were unconstitutional. In construing § 1441 (b) and § 1441 (c) as giving a federal court authority to remove from the state court and power to adjudicate claims that could find no independent basis for federal court jurisdiction, the defendant disparaged the district court's Article III authority and violated the Ninth Amendment.

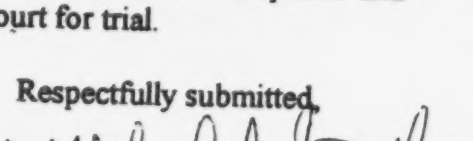
The district court erroneously found that whether the defendant's acts in dismissing Scott XIII were without constitutional support was "irrelevant to the determination this Court must make with respect to the applicability of the doctrine of judicial immunity." *Opinion and Order*, p. 10. The district court's reasoning was based entirely on federal statutes § 1441 (b) and § 1441 (c) giving the defendant authority and jurisdiction to remove state law claims from state court and dismiss them on the merits in federal court. Notwithstanding the authority conferred by Congress to federal courts in removal statutes § 1441 (b) and § 1441 (c), it was the Constitution that controlled the authority and power of the federal court to dismiss Scott XIII on the merits. As aforementioned, to the extent that Congress conferred upon the defendant in removal statutes § 1441 (b) and § 1441 (c) to remove plaintiff's separate and distinct state law claims from state court and then adjudicate them in federal court, neither § 1441 (b) or § 1441 (c) could find constitutional support and both violated Article III § 2 and the Tenth Amendment, and their application to Scott XIII violated the Ninth Amendment. Removal statutes § 1441 (b) and § 1441 (c) could not confer on a federal court power and jurisdiction not supported by the Constitution. Without making the relevant determination of whether the defendant's acts in Scott XIII and § 1441 (b) and § 1441 (c) as applied by the defendant in that case passed constitutional muster, the district court denied plaintiff due

process and equal protection when it granted the defendant's motion to dismiss.

CONCLUSION

For the foregoing reasons, the defendant committed acts of prosecuting and investigating both constitutionally reserved to the executive branch of the federal government, and removed state law claims from the state court and dismissed them on the merits, without constitutional authority and power, in the clear and complete absence of all jurisdiction. The district court, in dismissing plaintiff's amended complaint, denied plaintiff his right to due process and equal protection. Plaintiff respectfully requests that this Honorable Court vacate the district court's dismissal of his amended complaint and remand the case to the district court for trial.

Respectfully submitted,



Michael A. Scott
Petitioner, pro se

4753 Longmont Road
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Case No.:

In The

Supreme Court of the United States

MICHAEL A. SCOTT

Petitioner,

Versus

HENRY COKE MORGAN, JR.

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITIONER'S APPENDIX

PETITIONER'S APPENDIX

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Petitioner's Appendix A
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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1933

MICHAEL A. SCOTT,
Plaintiff – Appellant,

versus

HENRY COKE MORGAN, JR.,
Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (CA-00-895-2)

Submitted: October 4, 2001 Decided: October 11, 2001

Before NIEMEYER, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Michael A. Scott, Appellant Pro Se. Richard Parker, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Michael A. Scott appeals the district court judgment granting Judge Henry Coke Morgan, Jr.'s motion to dismiss for failing to state a claim and dismissing the complaint. We have reviewed the record and the district court's order and opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Scott v. Morgan, CA-00-895-2 (E.D. Va. May 25, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Petitioner's Appendix B
District Court's Opinion and Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED MAY 24, 2001

MICHAEL A. SCOTT,
Plaintiff,

v. **Civil Action No 2:00cv895**

HENRY COKE MORGAN, JR.,
Defendant.

OPINION AND ORDER

On November 28, 2000, Plaintiff, who is proceeding *pro se*, filed suit seeking money damages from the Defendant, a federal judge in the United States District Court for the Eastern District of Virginia, for alleged violations of his rights under the First, Second, Fourth, Fifth, Sixth Eighth, and Thirteenth Amendments of the Consititution of the United States, 42 U.S.C. § 1985(2), 42 U.S.C. § 1985(3), 42 U.S.C. § 1986, and 42 U.S.C. § 1981. Plaintiff seeks $500,000 in compensatory damages and $500,000 in punitive damages. Plaintiff, however, has failed to state a claim for which relief can be granted because Judge Morgan is entitled to absolute immunity from suit for these alleged violations. Accordingly, the Court hereby dismissses Plaintiff's claims with prejudice pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6).

I. Background

Plaintiff filed his original complaint on November

28, 2000. On January 29, 2001, Judge Morgan filed a motion to dismiss in which he claimed absolute judicial immunity. By February 14, 2001, the motion to dismiss was fully briefed and ready for decision. Nevertheless, on February 22, 2001, Plaintiff filed an amended complaint in which he reiterated his earlier allegations and included additional claims. Judge Morgan again moved to dismiss this action on the grounds of absolute judicial immunity.

Plaintiff's claims relate to rulings Judge Morgan made during the course of presiding over two in a series of lawsuits brought by Mr. Scott against his former employer, Norfolk Southern Corporation, and many of its employees, agents, and attorneys (collectively, the "Norfolk Southern Defendants"). The parties refer to these cases as "Scott X"[1] and "Scott XIII"[2] because they are Mr. Scott's tenth and thirteenth civil actions against the Norfolk Southern Defendants to have been either brought in or removed to federal court.

---

[1] Scott v. Norfolk Southern Corp., Civil Action No. 2:98cv180 (E.D. Va.).

[2] Scott v. Norfolk Southern Corp., Civil Action No. 2:99cv1814 (E.D. Va.).

Plaintiff's allegations against Judge Morgan fall into two categories: (1) that Judge Morgan improperly assumed the authority of a federal by holding Mr. Scott in contempt of court on two occasions during the course of the Scott X litigation; and (2) that Judge Morgan, through *ex parte* communications, combined and conspired with the Norfolk Southern Defendants to deprive Mr. Scott of access to state courts by refusing to remand and by dismissing the Scott XIII case.[3] The Court shall address below the application of judicial immunity to each of these allegations.

II. Discussion

In evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must accept the factual allegations contained in the complaint as true. Advanced Health Care Serv. v. Radfore Community Hosp., 910 F.2d 139, 143 (4th Cir. 1990). Dismissal is appropriate only if it appears to a certainty that Plaintiff would not be entitled to relief under any state of facts which could be proven in support of his claim. "Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages." Mireless v. Waco, 502 U.S. 9, 11, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991). Accordingly, it is impossible for Plaintiff to state a claim for which relief can be granted with respect to any of Judge Morgan's actions that fall within the broad ambit of judicial immunity, and any such claim must be dismissed..

---

[3] Judge Morgan denies these allegations and objects to Plaintiff's characterization of the facts. Judge Morgan recognizes, however, that for purposes of considering the pending motion to dismiss, the Court must accept as true the facts alleged in the original and amended complaint.

"The absolute immunity from suit for alleged deprivation of rights enjoyed by judges is matchless in its protection of judicial power." McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972). As early as 1872, the Supreme Court of the United States recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). For this reason, "a federal judge may not be held accountable in damages for a judicial act taken within his court's jurisdiction." Cleavinger v. Saxner, 474 U.S. 193, 199, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985). Such immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." Id., at 200, quoting Bradley, 13 Wall. At 347. "Nor can this exemption of judges from civil liability be affected by the motives with which their judicial acts are performed." Id.; Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967) ("immunity applies even when the judge is accused of acting maliciously or corruptly").

A judge's absolute immunity from suit is overcome in only two sets of circumstances. First, "a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity." Mireless, 502 U.S. at 11. Factors relevant to evaluating whether a judge has acted within his judicial capacity are (1) whether the act complained of is a normal judicial function; (2) whether the act occurred in the courtroom or an appropriate adjunct space, such as the judge's chambers; (3) whether the controversy related to a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity. Malina v. Gonzales, 994 F.2d 1121,

1124 (5th Cir. 1993); Ashelman v. Pope, 793 F.2d 1072, 1075-76 (9th Cir. 1986). These factors are to be construed broadly in favor of immunity. Malina, 994 F.2d at 1124. Second, "a judge is not immune for actions, though judcial in nature, taken in complete absence of all jurisdiction." Id., at 12. A judge, however, cannot be held liable for merely acting in excess of his authority. "If judicial immunity means anything, it means that a judge 'will not be deprived of immunity because the action he took was in error, or was in excess of his authority." Mireless, 502 U.S. at 12.

With these principles in mind, the Court turns to each of Plaintiff's allegations to determine whether the doctrine of judicial immunity shields Judge Morgan from liability for the claims contained in the amended complaint.

A. Criminal Contempt Citations

Plaintiff alleges that Judge Morgan first held him in criminal contempt on July 10, 1998, when Judge Morgan fined him $100. Plaintiff also alleges that the following year, on July 8, 1999, Judge Morgan cause a United Service Marshall to serve Mr. Scott with an order requiring him to appear in court to show cause as to why he should not be held in criminal contempt of court for having filed a post-judgment motion in Scott X. Plaintiff alleges that during the August 26, 1999 hearing on this show cause order, Judge Morgan intimidated him into testifying. Plaintiff firther asserts that Judge Morgan held a second hearing on October 1, 1999, in which the Plaintiff was required to answer charges that he committed perjury and practiced law illegally. Judge Morgan allegedly combined and conspired with the Norfolk Southern Defendants to formulate these charges and to improperly subpoena a witness to testify during the October 1, 1999 hearing.

Ultimately, Judge Morgan found Plaintiff in contempt of court in violation of 18 U.S.C. § 401(3), and Plaintiff was sentenced to probation. Plaintiff's conviction and sentence, however, were vacated on appeal. In overturning Plaintiff's conviction, the Fourth Circuit noted that "[t]he procedures attendant to the prosecution of a criminal contempt charge depend largely upon whether the conduct constitutes direct or indirect contempt." United States v. Scott, 2000 WL 779069, *1 (4th Cir. June 19, 2000), quoting United States v. Neal, 101 F.3d 993, 997 (4th Cir. 1996). Direct contempt, which involves conduct that occurs in open court and in the presence of the judge, may be punished summarily, without some of the procedural safeguards that attend a criminal prosecution. If, however, a defendant is alleged to have committed indirect contempt, which involves conduct outside of the presence of the court that must be proved throught the testimony of third parties, then more normal adversary procedures are required. Id. The Fourth Circuit concluded that the fall 1999 contempt charge against Mr. Scott was of the indirect variety, and, accordingly, Judge Morgan should have assigned an independent prosecutor to prosecute the charges. Id.

There is no question that citing a litigant for contempt is a normal judicial function within the jurisdiction of district court judges. See Malina, 994 F.2d at 1124. Both instances in which Plaintiff was found in contempt took place in open court while Judge Morgan was on the bench and acting in his official capacity as a judge presiding over the Scott X litigation pending before him. It is fundamental that "courts possess an inherent power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates" and that they "are vested with the power to initiate contempt proceedings to ensure that the judiciary is not utterly dependent upon the other branches of government to vindicate judicial

authority." Neal, 101 F.3d at 996 (quotations ommitted). The July 1998 contempt citation appears to have involved direct contempt, the summary punishment of which was well within Judge Morgan's authority. See Scott, 2000 WL 779069, at *1; Fed. R. Crim. P. 42(a). With respect to the fall 1999 conviction, even though the Fourth Circuit found that Mr. Scott was not afforded all of the procedural protections to which he was entitled, Judge Morgan cannot be held civilly liable for the error. "A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." Stump v. Sparkman, 435 U.S. 349, 359, 98 S.Ct. 1099, 1106, 55 L.Ed.2d 331 (1978); Malina, 994 F.2d at 1124-25 (judge immune from claims related to procedurally flawed issuance of contempt citation and imposition of jail sentence).

Mr. Scott's claims directly implicate the core rationale underlying the doctrine of judicial immunity -- *i.e.*, that "judicial officers in whom discretion is entrusted must be able to exercise discretion vigoriously and effectively, without apprehension that they will be subjected to burdensome and vexatious litigation." McCray, 456 F.2d at 3. "[A judge's] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption." Pierson, 386 U.S. at 554. Accordingly, Judge Morgan is immune from liability for his actions related to holding Plaintiff in contempt of court and sentencing him, and all such claims must be dismissed.

B. Conspiracy with the Norfolk Southern Defendants

Plaintiff also seeks to hold Judge Morgan liable for engaging in *ex parte* communications with the Norfolk

Southern Defendants in furtherance of an alleged conspiracy to deprive Plaintiff of access to the state courts in connection with the Scott XIII litigation. Plaintiff initiated the Scott XIII case against the Norfolk Southern Defendants by filing suit in Circuit Court for the City of Virginia Beach, Virginia on October 5, 1999. In Scott XIII, Plaintiff alleged harassment and discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981, as well as an assortment of state law claims. The Norfolk Southern Defendants removed Scott XIII to federal court, and Plaintiff twice sought to have the case remanded. On April 7, 2000, Judge Morgan denied Plaintiff's motions to remand and dismissed Scott XIII on several grounds, including *res judicata* and frivolousness.

Plaintiff acknowledges, as he must, that Judge Morgan's decisions against remanding Scott XIII and in favor of dismissing that action are judicial in nature. Citing the Ninth Circuit case, Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), Plaintiff argues that Judge Morgan, nevertheless, can be held liable for these decisions because he is alleged to have conspired with the Norfolk Southern Defendants to fix the outcome of the Scott XIII litigation. In Rankin, the Ninth Circuit held that "[a]lthough a party conniving with a judge to predetermine the outcome of a judicial proceeding may deal with him in his 'judicial capacity,' the other party's expectation, i.e., judicial impartiality, is actively frustrated by the scheme. In any event, the agreement is not a 'function normally performed by a judge.' It is the antithesis of 'principled and fearless decision making' that judicial immunity exists to protect." Rankin, 633 F.2d at 847 (citations omitted).

Mr. Scott's reliance on Rankin, however, is misplaced. The Ninth Circuit has reconsidered and

expressly overruled Rankin, and its rationale for doing so illustrates the importance of insulating judges from liability for the sort of claims Mr. Scott asserts in this case. Courts of appeals had severely criticized Rankin for permitting "judges, on mere allegations of conspiracy or prior agreement, [to be] hauled into court and made to defend their judicial acts, the precise result judicial immunity was designed to avoid." Id., at 1077, quoting Dykes v. Hoseman, 776 F.2d 942, 946 (11th Cir. 1985) (en banc). The Fifth Circuit, in rejecting Rankin, reasoned that:

> It requires little skill or imagination to convert many allegations that a judge has ruled in "bad faith" into allegations that he conspired to do so or was bribed; thus the threat to disinterested decision-making is similar. An embittered, losing party is just as likely to allege bribery or conspiracy as any other malevolent motive of a judge. The possibility that judges will be driven to wasteful and distracting self-protective measures is just as great where liability could flow from conspiracy or bribery charges as from a charge of "bad faith."

Halloway v. Walker, 765 F.2d 517, 523 (5th Cir. 1985). Acknowledging this criticism, the Ninth Circuit in Ashelman concluded that Rankin had "construed the immunity doctrine too narrowly by focusing on underlying actions instead of looking to the ultimate acts." 793 F.2d at 1078. Accordingly, "a conspiracy between judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges." Id., at 1078.

Judge Morgan's decisions related to the disposition of Scott XIII were quintessential judicial acts out of which no liability on the part of Judge Morgan can flow, whether or not those decisions were the product of some conspiracy against Mr. Scott's interests. Further, the Supreme Court has made clear that the presence of *ex parte* or other irregular procedures cannot serve to strip a judge of immunity. See Forrester v. White, 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555 (1988), citing Stump, 435 U.S. at 363 n. 12 ("the informal and *ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character"). For these reasons, the Court finds that Judge Morgan's actions with respect to his disposition of the Scott XIII matter were judicial in nature. Judge Morgan, accordingly, is immune from suit to the extent that there existed some jurisdictional basis for these decisions.

The Court now turns to whether Judge Morgan acted in "complete absence of all jurisdiction" in denying Plaintiff's motions to remand and in dismissing Scott XIII. Clearly, he did not. The federal removal statute provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to citizenship or residence of the parties." 28 U.S.C. § 1441(b). Further, "[w]henever a separate and independent claim or cause of action within the [federal question] jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." 28 U.S.C. § 1441(c). District courts possess, as they obviously must, the jurisdiction necessary to determine whether removal of a

case from state court was proper. 28 U.S.C. §§ 1447 and 1448.

Plaintiff argues at length that the removal of Scott XIII was so improper that Judge Morgan lacked jurisdiction to arrive at any conclusion other than that in favor of remand. This argument is nothing more than an expression of Plaintiff's disagreement with Judge Morgan's rulings. In accordance with the jurisdiction conferred by the above-referenced statutes, Judge Morgan ruled that the Norfolk Southern Defendants' removal was proper and that dismissal of that case was warranted. Whether Judge Morgan's decisions in this regard were correct is irrelevant to the determinations this Court must make with respect to the applicability of the doctrine of judicial immunity. It would be entirely improper for this Court to accept Plaintiff's invitation to review Judge Morgan's rulings for error. Indeed, "[j]udicial immunity apparently developed, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error." Forrester, 484 U.S. at 225. Judge Morgan did not act in the clear absence of all jurisdiction in making his rulings in Scott XIII, and, accordingly, he is immune from this lawsuit. Plaintiff should direct any argument that Judge Morgan erred in the exercise of his discretion to the Court of Appeals.

III. Conclusion

For the reasons set forth above, the Individual Federal Defendant's Motion to Dismiss Amended Complaint hereby is **GRANTED.** Plaintiff's claims against Judge Morgan are **DISMISSED** with prejudice.

The Clerk is **REQUESTED** to send copies of this Opinion and Order to the *pro se* Plaintiff and to the United States Attorney's Office in Norfolk, Virginia.

Plaintiff is **ADVISED** that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, 600 Granby Street, Norfolk, Virginia 23510. This written notice of appeal must be received within sixty (60) days from the date of this order.

IT IS SO ORDERED.

/s/ Raymond A. Jackson
UNITED STATES DISTRICT JUDGE

May 24, 2001
Norfolk, Virginia

Petitioner's Appendix C
Amended Complaint

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

MICHAEL A. SCOTT

Plaintiff,

vs. **Civil Action No. 2:00cv895**
Jury Trial Demanded

HENRY COKE MORGAN, JR.

Defendant.

AMENDED COMPLAINT

I. PARTIES

1. Plaintiff Michael A. Scott is a male citizen and resident of the Commonwealth of Virginia residing in Virginia Beach.

2. Defendant Henry Coke Morgan, Jr. was a United States District Judge at the United States District Court for the Eastern District of Virginia at Norfolk at all material times relevant to the claims alleged against him. Defendant Morgan, having acted under color of federal

authority flowing from his judgeship, is being sued in his individual capacity.

II. JURISDICTION

3. Jurisdiction of this federal court is invoked pursuant to 28 U.S.C. § 1331. Supplemental jurisdiction over the state law claims arising from the same transactions is invoked pursuant to 28 U.S.C. § 1367.

III. PLAINTIFF'S ALLEGATIONS AND CLAIMS

NOW COMES plaintiff Michael A. Scott, as *pro se*, to allege the following in support of his claims for monetary relief against defendant Morgan.

4. On July 10, 1998, during a hearing in civil action 2:98cv180 ("Scott X"), the defendant, having improperly usurped the authority equivalent to that of a federal prosecutor from the executive branch of the United States government, and in clear absence of all jurisdiction, initiated, charged and prosecuted a criminal contempt charge against the plaintiff which actually and proximately caused plaintiff to pay a $100 fine to the district court clerk. The defendant gave the plaintiff no notice of the proceeding, and no notice that such a proceeding was under consideration. The prosecuting conduct of the defendant denied plaintiff his due process right to a disinterested judge, his due process right to a judge who had not prejudged his case, his right to the advice of counsel at each critical stage in the proceeding, his right to notice of the proceeding, his due process right to a reasonable amount of time to prepare a defense against the charge, and improperly caused plaintiff deprivation of his $100.

5. On July 8, 1999, in connection with Scott X, the defendant, having improperly usurped the authority equivalent to that of a federal prosecutor from the executive branch of the United States government, and in clear absence of all jurisdiction, initiated a criminal contempt proceeding against plaintiff, charged plaintiff with criminal contempt of court and effected service of a show cause order on plaintiff by a U. S. marshall, for having filed a post-judgment motion with the clerk on July 7, 1999. Further, on August 26, 1999, the defendant, in the clear absence of jurisdiction, under the guise of prosecuting authority, combined and conspired with the Scott X defendants for the defendant and the Scott X counsel to jointly prosecuted the criminal contempt charge against the plaintiff which actually and proximately caused plaintiff to be convicted, falsely imprisoned and subjected to supervision by the United States Probation Office from October 1, 1999 to January 4, 2000 at which time he was sentenced to six months probation with severe restrictions and conditions. In the course of prosecuting the contempt charge on August 26, 1999, the defendant caused, through intimidating and power abusive tactics, the plaintiff to testify during the proceeding. The prosecuting conduct of the defendant denied plaintiff his due process right to a disinterested judge, his due process right to a judge who had not prejudged his case, his right to the advice of counsel at each critical stage in the proceeding, and his right not to testify against himself during his criminal proceeding. As a result, the defendant's malicious and abusive prosecuting conduct actually and proximately caused plaintiff to be placed under the supervision of a probation officer under which plaintiff's rights to life, liberty and the pursuit of happiness were improperly abrogated, restricted and compromised. Further, the defendant's prosecuting conduct actually and proximately caused plaintiff to be subjected to involuntary servitude in complying with probation and

release conditions, an abrogation of plaintiff's right to bear arms, and an abrogation of plaintiff's right to certain intrastate and all interstate and international travel.

6. Between July 8, 1998 and January 4, 2000, the defendant, acting pursuant to his improperly usurped prosecuting powers, maliciously, wantonly and with a reckless disregard for plaintiff's rights, combined and conspired with [the defendants and their counsel, Williams Kelly & Greer, P.C. (now defunct) in Scott X] to accuse plaintiff on August 26, 1999 and again on October 1, 1999 of perjury and of practicing law illegally under the laws of the Commonwealth of Virginia, and to improperly investigate those charges for which no evidence was found, and combined and conspired to impede, and did impede, plaintiff's full access and all accompanying constitutional rights to the federal court in connection with the criminal contempt proceeding, and combined and conspired with and on behalf of the Scott X defendants to intimidate and retaliate against plaintiff for having litigated as a party and witness in numerous lawsuits he filed in federal and state court against the Scott X defendants, and combined and conspired to influence, and did influence, the verdict in the criminal contempt proceeding, and combined and conspired with and on behalf of the Scott X defendants (who threatened plaintiff with race based revenge on two occasions for having filed racial discrimination claims against them) to impede, and did impede, plaintiff's rights to sue, be party and give evidence in connection with federal court litigation, and combined and conspired with and on behalf of the Scott X defendants to use the contempt proceeding as a whip to force, and did force, payments from the plaintiff on his indebtedness to the Scott X defendants. On August 26, 1999, in furtherance of his investigating tactics under the guise of improperly usurped prosecuting authority, the defendant combined and conspired with [the

defendants and their counsel in Scott X] to cause improperly used subpoena power to command the presence of a witness, George Mungin, on October 1, 1999 to testify regarding the charges made against plaintiff of perjury and of illegally practicing law for the purposes of intimidating and harassing the plaintiff, and impeding his access to the federal court.

7. The cumulative prosecuting conduct of the defendant and its impact on plaintiff intentionally inflicted, and did inflict, the plaintiff with severe emotional distress which manifested itself in increased stress, mental anguish, loss of appetite, humiliation, embarrassment and sleeplessness, and falsely imprisoned plaintiff, both in violation of Virginia law. The prosecuting conduct of the defendant in accusing the plaintiff of perjury and of illegally practicing law had absolutely no relevance or relation to the contempt proceeding and, as a result, maliciously defamed and insulted plaintiff, both in violation of Virginia law.

8. As a result, the defendant's prosecuting conduct actually and proximately caused plaintiff's rights under First Amendment, Second Amendment, Fourth Amendment, Fifth Amendment, Sixth Amendment, Eight Amendment and Thirteenth Amendment to the United States Constitution to be violated. As a consequence of the conspiracy alleged herein, plaintiff's rights under 42 U.S.C. § 1985 (2), 42 U.S.C. § 1985 (3), 42 U.S.C. § 1986 and 42 U.S.C. § 1981 were violated. Plaintiff is also entitled to recover damages against defendant Morgan for the Fourth Amendment, Fifth Amendment, Sixth Amendment and Eight Amendment violations pursuant to *Bivens v. Six Unknown Named Agents Of Fed. Bur. Of Narc.*, 91 S.Ct. 1999, 403 U.S. 388 (1971).

9. As a result of the defendant's prosecuting conduct, malicious and without probable cause as it was, plaintiff was subjected to a malicious civil and criminal prosecution and an abuse of process in violation of Virginia law from which flowed a criminal contempt conviction, and vacation of that conviction by the Fourth Circuit court of appeals. In vacating that conviction, the Fourth Circuit specifically found it improper under existing circuit precedent for the defendant to have prosecuted the criminal contempt charge. Thereafter, the defendant, acting pursuant to his improperly usurped prosecuting authority, initiated the process which led to dismissal of the criminal contempt charge. Indeed, even the Office of the United States Attorney conceded on appeal that the defendant's prosecuting conduct was improper under existing circuit precedent and, thus, recommended to the Fourth Circuit that plaintiff's conviction be vacated for this reason.

10. Plaintiff filed a lawsuit in the circuit court for the city of Virginia Beach, Virginia on October 5, 1999 against the Scott X defendants. This case was removed to the United States District Court for the Eastern District of Virginia, Norfolk Division. Plaintiff twice moved the district court to remand the case to state court for lack of jurisdiction. The presiding judge, defendant Morgan, twice denied plaintiff's motions, and then, in the clear and complete absence of jurisdiction over the subject matter and the parties, dismissed plaintiff's case with prejudice and imposed an appeal bond of $1,000 for its appeal to the fourth circuit court of appeal.

11. The Scott X defendants joined, combined and conspired with each other and with defendant Morgan, who acted in the clear and complete absence of jurisdiction, to maliciously and corruptly interfere with and obstruct, and did interfere with and obstruct, plaintiff's access to the

Virginia Beach and Norfolk circuit courts and to the federal court in the years 1999 and 2000. Specifically, as part of the continuous combination, conspiracy and meeting of the minds, agreements were made to remove plaintiff's state court cases from the state courts, Norfolk and Virginia Beach circuit court, in 1999, premised on fraudulent factual misrepresentations made in pleadings, to the federal court and for defendant Morgan to short circuit the state courts' exclusive jurisdiction by dismissing the two cases on the merits in the clear and complete absence of federal court subject matter and personal jurisdiction, and then for defendant Morgan to order, in the clear and complete absence of federal court subject matter and personal jurisdiction, that an appeal bond be posted for appeal of both cases to the fourth circuit court of appeals.

12. The Scott X defendants engaged in regular, routine and continuous ex parte communications and contacts with defendant Morgan about litigation between the plaintiff and them, and were informed by defendant Morgan, according to Samuel J. Webster, counsel for the Scott X defendants, of the district court's rulings and decisions before they were formally announced by the court. Specifically, during a hearing before the district court over which defendant Morgan presided, plaintiff, while sitting at the counsel's table in the courtroom, overheard, clearly and unambiguously, Webster discussing with Heather A. Mullen and another associate, all of whom were sitting at the defense counsel's table or near it in the courtroom, secret communications he had with defendant Morgan ex parte. Webster stated clearly and obnoxiously how he routinely had conversations with defendant Morgan about Scott litigation and knew what defendant Morgan's rulings and decisions would be before they were announced by the court. Further, defendant Morgan had been reassigned to a larger courtroom and chambers sometime before the hearing

and Webster specifically stated how he found out that defendant Morgan had changed courtrooms and chambers when he (Webster) came to the federal court building to visit him to discuss pending litigation.

13. The continuous and corrupt combination, conspiracy and meeting of the minds of the defendant with the Scott X defendants obstructed plaintiff's right to sue, be party, and give evidence in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981; obstructed plaintiff's access to the state courts and to the federal court in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1985 (2); violated plaintiff's rights under the Civil Rights Act of 1871, 42 U.S.C. §§ 1985 (3) & 1986; and denied plaintiff his due process right to a disinterested judge and a judge who had not prejudged his case in violation plaintiff's equal protection and due process rights under the Fifth Amendment to the United States Constitution. Plaintiff is also entitled to recover damages against defendant Morgan for the Fifth Amendment violations pursuant to *Bivens v. Six Unknown Named Agents Of Fed. Bur. Of Narc.*, 91 S.Ct. 1999, 403 U.S. 388 (1971).

IV. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Michael A. Scott prays for judgment against defendant Henry Coke Morgan, Jr. in the amount of ONE MILLION AND 00/100 DOLLARS ($1,000,000.00), namely FIVE HUNDRED THOUSAND AND 00/100 DOLLARS ($500,000.00) in compensatory damages and FIVE HUNDRED THOUSAND AND 00/100 DOLLARS ($500,000.00) in punitive damages, plus interest and costs.

Respectfully submitted,

/s/ Michael A. Scott
Plaintiff, *pro se*

Michael A. Scott
4753 Longmont Road
Virginia Beach, Virginia
23456-5017
(757) 495-0844

Petitioner's Appendix D
Scott XIII Order of Dismissal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED
April 7, 2000

MICHAEL A. SCOTT, *pro se*
Plaintiff,

v. **Civil Action No. 2:99cv1814**

NORFOLK SOUTHERN CORPORATION, *et al.*,
Defendants.

ORDER of DISMISSAL

On October 6, 1999, Michael A. Scott, *pro se*, filed this lawsuit in Circuit Court for the City of Virginia Beach. On October 28, 1999, the defendants removed the case to federal court. Upon removal, this became Scott XIII, the thirteenth case filed by Scott against his former employer, Norfolk Southern Corporation, their employees, agents, and attorneys, (the "Norfolk Southern defendants") to reach this Court. On November 8, 1999, Scott moved to remand this action. On March 28, 2000, Scott requested a hearing on his motion to remand.

Having reviewed the parties' briefs, the Court **FINDS** it unnecessary to hold a hearing on the motion to remand. For the reasons stated herein, the Court **DISMISSES** this action with prejudice.

I. Allegations in Scott XIII

On October 4, 1999, in a related cause of action, Scott X (2:98cv180), the Court, having previously found Scott in contempt of court for failing to obey court orders, order the United States Probation Office to produce a Pre-Sentence Investigation Report on Scott, and ordered Scott to appear on January 4, 2000, for his sentencing. On October 6, 1999, Scott filed this lawsuit in the Circuit Court for the City of Virginia Beach. Scott named as defendants: Norfolk Southern, David R. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry W. Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Samuel J. Webster, Heather A. Mullen, David N. Payne, Williams Kelly & Greer, P.C., Ernie Price, Elias I. Vega, M. J. Moore, Roger A. Petersen, Mark D. Perreault, and Robert C. Scaro. As of October 28, 1999, the date of removal, defendants Manetta, Hale, and Luttrell had not been served. It is not clear whether defendants Catron and Payne had been properly served.

The allegations in Scott XIII concern four areas of factual contentions: (1) Scott's alleged employment contracts; (2) the Release Agreements; (3)the defendant's efforts to collect sanctions; and (4) the defendants' presentation of evidence during Scott's contempt hearing.

1. Employment Contracts

Scott alleges that the defendants "breached and tortuously [sic] interfered with the contract from defendant Goode guaranteeing Scott the right to work without such malicious, abusive and discriminatory conduct in the work place." He alleges that he was the subject of racial and sexual harassment between March 1993 and February 16, 1996. Scott further alleges that his alleged conduct on the

part of the defendants "breached and tortuously [sic] interfered with the compliance policy contract." Scott also alleges that this alleged conduct, "their 'unlawful discrimination, sexual harassment and retaliation in the work place,' defamation, assault and battery, and termination breached and tortuously [sic] interfered with the employment contract."

Scott alleges that the defendants "breached and tortuously [sic] interfered with" alleged contracts guaranteeing that Scott would continue to work throughout 1996. He alleges that the defendants' transferring Scott to Decatur, Illinois, from Norfolk constituted "terminating Scott's employment."

2. Release Agreements

On October 10, 1996, Scott and the Norfolk Southern defendants entered into Settlement and Release Agreements ("Release Agreements") in which Scott agreed to dismiss and forego "further litigation against NS and any of its officers, directors, agents, employees, or former employees" in Scott IV (2:95cv1163), Scott VI (2:96cv610), and Scott VII (2:96cv699).

In the instant action, Scott XIII, Scott alleges that the defendants "fraudulently induced Scott to execute the release agreements and dismissal orders, and evinced an intent to practice actual fraud and or constructive fraud, deceit or misrepresentation."

3. Collection of Sanctions

On December 17, 1997, and by an amended order of December 19, 1997, the Court ordered Scott to pay $9,143.13 in sanctions to the Norfolk Southern defendants.

On January 9, 1998, Scott moved for reconsideration of the damages awarded. He appealed the sanctions judgment on January 16, 1997. The defendants initiated collection proceedings in Virginia Beach Circuit Court. In that court, Scott moved for a "Protective Order, for Stay and to Dismiss, and Objections to Interrogatories" and filed Scott X (2:98cv180) in federal court to claim that defendants' preliminary efforts to collect the sanctions were illegal. On July 22, 1998, the Court imposed a $100 contempt fine on Scott and granted the Norfolk Southern defendants' motion for Rule 11 sanctions. On September 22, 1998, after reviewing the defendants' statement of attorneys' fees and costs, the Court ordered Scott to pay the Norfolk Southern defendants $5,000.00 "to partially reimburse the defendants for their attorneys' fees and costs associated with defending Scott X." Noting "that Scott's response to prior sanction awards is to refuse to pay and institute new lawsuits concerning the defendant's [sic] legal efforts to collect the sanctions judgment," the Court advised Scott that filing frivolous lawsuits on these issues might again lead the Court to hold him in contempt. On July 16, 1998, Scott moved to vacate. The Court denied his motion on September 2, 1998. Again, on September 9, 1998, Scott moved to vacate or reconsider the orders awarding sanctions and finding Scott in contempt. This motion was denied on December 1, 1998. On July 7, 1999, after his appeal to the Court of Appeals was dismissed for failure to post a bond, Scott moved for a third time to vacate the sanctions order.

In Scott XIII Scott again alleges that the defendants did not follow proper procedures in attempting to collect the sanctions and alleges that "[t]he conduct of the defendants (excluding Payne) fraudulently induced the imposition of a $5,000 sanction against Scott by the federal court, and evinced an intent to practice actual fraud and or constructive fraud, deceit and or misrepresentation." He

alleges malicious abuse of the legal process, malicious prosecution, and violation of his rights under Article I, § 11, of the Virginia Constitution.

4. Defendants' Presentation of Evidence During Contempt Hearing

Scott alleges that the defendants "humiliated, belittled, defamed and insulted Scott, and evinced an intent to maliciously prosecute (both civilly and criminally) Scott in federal court in order to force payment of the sanctions." As the basis for these allegations, Scott draws on the defendants' presentation of evidence during a hearing where the Court had ordered Scott to show cause why he should not be held in contempt. At the hearing the defendants presented a deposition of George Mungin that suggested that Scott had helped Mungin prepare his complaint for federal court. In light of this evidence, the Court continued the show cause hearing so that it could determine whether Scott had perjured himself and whether he had practiced law illegally. At the continuation of the hearing, the Court made no such findings.

II. Procedural and Factual Background[1]

Much of the factual background of Scott XIII is the history of Scott litigation. Both the plaintiff and defendants have raised issues that depend on familiarity with this history. Accordingly, the Court briefly sets forth, at the risk of oversimplifying these matters, a recapitulation of Scott's cases against the Norfolk Southern defendants.

[1] The Court has construed the facts as presented here solely upon the existing record and for the limited purposes of determining whether the Court has jurisdiction, ruling on the plaintiff's motion, and deciding whether to dismiss the action.

Scott I and Scott III[2]

Scott I (2:95cv377) and Scott III (2:95cv815), alleged breach of contract, battery, intentional infliction of emotional distress, and a Title VII claim, all arising from Scott's allegations that he was subjected to same-sex harassment while an employee at Norfolk Southern. The Court granted summary judgment in favor of the defendants on the Title VII claim, and a jury awarded Scott $50,000 on the battery claim. On January 5, 1996, Norfolk Southern offered Scott $70,000 in exchange for his resignation and release of any additional legal claims against Norfolk Southern.[3] Scott declined Norfolk Southern's offer.

2 Scott II (2:95cv798) was dismissed without prejudice upon motion of Scott, who was proceeding *pro se*.

3 At the time, Scott had instituted another suit in federal court against the defendants and another in state court. In the state case (At Law No. L96-392, Norfolk Cir. Ct.), Scott alleged that Norfolk Southern and its counsel in Scott I and Scott III presented an improper and malicious defense in those cases. Norfolk Circuit Court dismissed this case.

Scott IV[4]

On December 5, 1999, Scott, *pro se*, filed a complaint, Scott IV (2:95cv1163),[5] against Norfolk Southern and some of its employees alleging breach of duty under the Federal Employers' Liability Act ("FELA") by failing to provide an emotionally safe work place; sexual assault and battery under FELA, intentional infliction of emotional distress under FELA, and negligent infliction of emotional distress under FELA. Scott amended his complaint to include an allegation of retaliation and conspiracy under the First Amendment and the Civil Rights Act of 1866 and to include the following individual defendants: J. W. Clemmer, Jeff Pair, Jerry Gray, and Donald Graab. The Court dismissed the suit against Norfolk Southern on *res judicata* grounds. The Court ordered Scott to particularize the complaint as it related to Clemmer, Pair, Gray, and Graab. On October 15, 1996, upon stipulation by Scott and counsel for the defendants, the Court dismissed this action.

[4] The Court has referred to this case as Scott III in its dismissal order in 2:99cv348 (Scott XI) and in previous orders. The combination of Scott I (2:95cv377) and Scott III (2:95cv815) into what has been called Scott I, because the Court did not anticipate so many subsequent cases over several years, has created some confusion in the numbering system. The Court now provides each action with an ascending Roman number according to its filing date, regardless of whether actions were combined. The action numbers, of course, provide the most reliable source of identification.

[5] The defendants in Scott IV were: Norfolk Southern, Donald D. Graab, Jerry R. Gray, Jeff E. Pair, and Jerry W. Clemmer.

Two years later, on October 26, 1998, Scott moved to vacate the Court's dismissal of Scott IV. On March 23, 1998, the Court found that the defendants had not violated the terms of the Release Agreements and denied Scott's motion. On March 26, 1999, the Court ordered that Scott may file no further pleadings in the nature of motions to reopen or reconsider without prior approval of the Court.

Scott V

On May 2, 1996, Scott, *pro se*, filed a 32-count complaint, Scott V (2:96cv257),[6] against Norfolk Southern and fourteen of its employees. In his fifth amended complaint Scott alleged: (Count 1) Title VII racial discrimination and retaliation for Scott's previous EEOC charge and lawsuits against Norfolk Southern and its employees and agents; (Count 2) personal injury under FELA; (Count 3) common law assault and battery; (Count 4) Virginia common law wrongful discharge; (Count 5) intentional infliction of emotional distress under FELA; (Count 6) negligent infliction of emotional distress under FELA; (Count 7) Virginia common law intentional infliction of emotional distress; and (Count 8) Virginia common law negligent infliction of emotional distress. On February 5, 1997, the Court granted the defendants' motions for summary judgment on Counts 1, 5, 6, 7, and 8. The Court denied the defendants' motion to dismiss Count 4 and denied their motion for summary judgment on Counts 2 and 3.

[6] The defendants in Scott V were: Norfolk Southern, David R. Goode, S.C. Tobias, Jon L. Manetta, William Honeycutt, Lewis Hale, Timothy Heilig, C.D. Vittur, Donald D. Graab, Artis Luttrell, Jerry Gray, Wayne Henley, Jeff Pair, J.W. Clemmer, and three John Doe Police Agents for Norfolk Southern.

On April 2, 1997 a jury found that Scott was not racially harassed in violation of federal law, that Scott was not terminated because of his race in violation of federal law, and that Scott was not terminated because of his race in violation of state law. The jury found for the defendants on the assault and battery charge. Finding for Scott on the remaining FELA charge, the jury stated that the percentage of Scott's negligence contributing to his injury was 51%. Scott was awarded $4,998.00.

Scott VI

On June 14, 1996, Scott, *pro se*, filed Scott VI (2:96cv610), a seventeen-count complaint against the same defendants named in Scott V.[7] Scott VI alleged racial discrimination and retaliation for filing Scott I and Scott II, in violation of the Constitution, the Virginia Constitution, RICO, and FELA. By stipulation of the parties, this action was dismissed on October 15, 1996.

Two years later, on October 26, 1998, Scott moved to vacate the Court's dismissal on the grounds of fraud and based on defendants' alleged breach of the Release Agreements. The Court denied this motion.

[7] The defendants in Scott VI were: Norfolk Southern, David R. Goode, S.C. Tobias, Jon L. Manetta, William Honeycutt, Lewis Hale, Timothy Heilig, C.D. Vittur, Donald D. Graab, Artis Luttrell, Jerry Gray, Wayne Henley, Jeff Pair, J.W. Clemmer, and three John Doe Police Agents for Norfolk Southern.

Scott VII

On July 11, 1996, Scott, *pro se*, filed Scott VI (2:96cv699)[8] alleging that Norfolk Southern, three attorneys from Williams, Kelly & Greer, and four attorneys from Kaufman and Canoles maliciously abused the legal process in the defense of Scott IV in the Norfolk Circuit Court. Scott alleged that the defendants, motivated by racial hatred, conspired to belittle, racially humiliate, harass and intimidate Scott through (1) threatening to seek sanctions; (2) the language in defendants' court filings; (3) engaging in *ex parte* communications with the judge, and (4) conspiring with the judge to retaliate, intimidate, and humiliate Scott. By stipulation of the parties, this action was dismissed on October 15, 1996.

[8] The defendants in Scott VII were: Norfolk Southern, David R. Goode, S.C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C.D. Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, and J.W. Clemmer.

Scott VIII

On May 27, 1997, Scott, *pro se*, filed Scott VIII (2:97cv522)[9] against Norfolk Southern, Landmark Communications, and fourteen individual employees of Norfolk Southern. Scott claimed that Norfolk Southern, through individual defendants, alleged wrote classified ads that appeared in *The Virginian-Pilot*, owned by Landmark. Scott claimed that the ads harmed his personal and professional reputation and interfered with his ability to enter into business and educational relationships. Scott further alleged that the ads were motivated by racial animus and were in retaliation for his previous Title VII lawsuits. All counts except those against the individual defendant Clemmer were dismissed. On May 15, 1998, a jury returned a verdict in favor of Clemmer. On February 10, 1999, the Court of Appeals affirmed the judgment of the District Court.

[9] The defendants in Scott VIII were: Norfolk Southern, David R. Goode, S.C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C.D. Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, J.W. Clemmer, and Landmark Communications.

Scott IX

On December 5, 1997, Scott, *pro se,* filed Scott IX (2:97cv1134)[10] against Norfolk Southern, its employees, and agents. The original complaint alleged ten claims against W. D. Catron, Jr. and G. L. Hedgepath consisting of violations under: 1) 42 U.S.C. § 1981; 2) Racial Harassment under Va. Code Ann. 8.01-42.1; 3) 42 U.S.C. §§ 1985(2) and (3); 4) 42 U.S.C. § 1986; 5) 42 U.S.C. § 1983; 6) the First, Fifth and Fourteenth Amendments of the United States Constitution; 7) Virginia Constitution, Art. I, Sec. 11 (which discusses due process of law and the right to be free from discrimination); and 8) Wrongful Discharge; 9) Intentional Infliction of Emotional Distress; and 10) Negligent Infliction of Emotional Distress. In January, 1998, Scott moved to amend his complaint. In the new complaint Scott largely reasserted the claims alleged in his original complaint against Catron and Hedgepath. Scott also added a tortious interference with contractual relations claim against them based on the same underlying facts, as well as an assault and battery claim against Catron.

10 The defendants in Scott IX ultimately were: Norfolk Southern, David R. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, and Jerry Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Roger A. Petersen, Mark D. Perreault, Heather A. Mullen, David Payne, Sam Webster, Williams Kelly & Greer, P.C.

In addition, Scott attempted to amend his complaint to add seventeen new claims against twenty-one new parties consisting of Norfolk Southern, sixteen Norfolk Southern employees,[11] three attorneys representing Norfolk Southern, and the attorneys' law firm.[12] The claims were based on events surrounding the execution of Release Agreements in Scott IV, Scott V, Scott VI, and Scott VII. The claims included: 1) breach of contract; 2) tortious interference with contractual relations; 3) fraud; 4) conspiracy to defraud; 5) claims pursuant to 42 U.S.C § 1981, § 1985(2) and (3), § 1986, and § 1983; and violations of the 6) First and Fourteenth Amendments; 7) Va.Const., Art I, Sec. 11; and 8) RICO.

The Court denied Scott's motion to amend the complaint in Scott IX on March 5, 1998. The Court Order commented on Scott's numerous attempts to amend and noted that on repeated occasions, Scott's response to an adverse ruling or denial of a motion to amend was to file another lawsuit. The Court found that the amendment was for the purpose of harassing the defendants, the amendment would prejudice the defendants, and the amendment lacked good faith as it was based on "oppressive personal animosity."

11 Fourteen of these employees are the same as those sued in Scott's last case, Scott VIII. The remaining two, Roger A. Petersen and Mark D. Perreault, are corporate attorneys employed by Norfolk Southern.

12 The three attorneys are Samuel J. Webster, Heather A. Mullen, and David N. Payne. All of these proposed defendants, as well as their law firm, Williams, Kelly & Webster, P.C., have previously been sued by Scott. These defendants are referred to as the "WKG Defendants."

On June 30, 1998, the Court dismissed all counts of the complaint in Scott IX. In July, 1998, the Court granted Catron and Hedgepath's motion for Rule 11 sanctions but denied their motion for sanctions pursuant to Rule 26(g).

On July 23, 1998, Scott moved the Court to vacate the judgment order, to reconsider the summary judgment and dismissal, or to conduct a rehearing. The Court denied these motions on September 2, 1998, and granted Catron and Hedgepath's motion for Rule 11 sanctions.

On October 26, 1998, Scott moved to vacate the September Order awarding sanctions and, relying on Rule 60(b)(3) & (6), to vacate the June judgment dismissing the complaint, and to restore the case to active civil docket. On December 8, 1998, the Court denied these motions.

On November 5, 1998, Scott filed a notice of appeal. The Court of Appeals for the Fourth Circuit dismissed this appeal because of Scott's failure to post an appeal bond.

Scott X

On February 17, 1998, Scott, *pro se*, filed Scott X (2:98cv180),[13] in which Scott disagreed with the preliminary efforts of the Norfolk Southern defendants to collect the

[13] The defendants in Scott X were: Norfolk Southern, David R. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Heather A. Mullen, Elias I. Vega, Williams Kelly & Greer, P.C., Roger A. Petersen, Mark D. Perreault, Sam Webster, and Williams Kelly & Greer, P.C.

Scott VIII sanctions judgment entered against Scott. On June 22, 1998, the Court granted the defendants' motions to dismiss and motions for summary judgment. The Court also imposed $5,000 in sanctions against Scott in this case. On July 16, 1998, Scott filed his first motion to vacate in this case. The Court denied that motion on September 2, 1998. Scott then filed another motion to vacate, which the Court denied on December 2, 1998. Next Scott appealed the dismissal of Scott X to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit dismissed the appeal for Scott's failure to post an appeal bond. On July 7, 1999, Scott filed a third motion to vacate judgment dismissing the case, to vacate judgment awarding sanctions against the plaintiff, and to restore the case to the active civil docket. On August 26, 1999, after a show cause hearing, the Court found Scott in contempt of court.

Scott XI

Scott XI (2:99cv348)[14] is a case that was originally filed, *pro se*, in the Circuit Court for the City of Norfolk. On March 8, 1999, the defendants timely filed notice of removal. Scott alleged that the defendants fraudulently induced him to execute release agreements and dismissal orders in Scott IV (2:95cv1163), Scott VI (2:96cv610), and Scott VII (2:96cv699). He also alleged that the defendants evinced an intent to practice actual fraud and/or constructive fraud, deceit, and/or misrepresentation when

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[14] The defendants in Scott XI are Norfolk Southern, David R. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry W. Clemmer, Gary L. Hedgepath, William D. Catron, Jr., Samuel J. Webster, Heather A. Mullen, David N. Payne, and Williams Kelly & Greer, P.C.

they did not carry out an oral agreement promising Scott that they would not raise any affirmative defenses in Scott IX, and that they would file motions with the Court withdrawing sanctions motions and "eliminate" sanctions which had been imposed. Count Two alleged that the defendants "breached and tortuously [sic] interfered with, and conspired to breach" the release agreements. Count Three alleged that the defendants' conduct with regard to the release agreements violated 42 U.S.C. § 1981. Finding Scott's lawsuit to be frivolous, the Court dismissed Scott XI on March 27, 2000. The Court found that Scott XI was based on the same allegations that Scott raised in Scott IV, Scott VI, and Scott IX.

Scott XII

On June 17, 1999, Scott, *pro se*, filed Scott XII (2:99cv935)[15] in federal court and amended his complaint on July 1, 1999. Scott again alleged that the Norfolk Southern defendants' initial attempts to collect sanctions against Scott were procedurally illegal. Scott alleged violation of the Fair Debt Collection Act; malicious abuse of process and malicious prosecution, intent to practice actual or constructive fraud, misrepresentation and deceit; violations of his rights under the Virginia constitution, the federal constitution, and Sections 1981, 1983, 1985, and

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15 The defendants in Scott XII are Norfolk Southern, David R. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Timothy A. Heilig, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, Jerry W. Clemmer, Elias I. Vega, Gary L. Hedgepath, David G. Petersen, Mark D. Perreault, William D. Catron, Jr., Samuel J. Webster, Heather A. Mullen, David N. Payne, and Williams Kelly & Greer, P.C.

1986 of U.S.C. Title 42; and violations of various Virginia statutes. Scott XII is currently pending before this Court.

III. Analysis

A. Jurisdiction and Scott's Motion to Remand

Upon removal the federal court acquires complete and exclusive jurisdiction. French v. Hay, 89 U.S. (22 Wall.) 238 (1874); Texas Pipe Line Co. v. Ware, 15 F.2d 171 (8th Cir.), cert. denied, 273 U.S. 742 (1926); see also 28 U.S.C. §§ 1447 & 1448 (authorizing the district court to issue all necessary orders to bring parties before it, giving the district court subject matter jurisdiction to rule on a motion to remand, and permitting service of process under the federal rules). Scott argues that the removal was procedurally defective. He argues that not all defendants were properly served and thus could not join in the removal, and he argues that defense counsel's assertion that they represent all the defendants is insufficient indication that these attorneys do, indeed, represent the defendants. None of these arguments is meritorious. At the most basic level, the removal statutes do not require, as Scott argues, that "all" defendants join in the removal procedure. On the contrary, the statutes contemplate serving some defendants after removal to federal court. 28 U.S.C. §§ 1447 & 1448.

Scott also argues that this action should be remanded because he asserts only state law claims. In support of his argument he concedes that "he has no timely action under any federal civil rights law."

Although Scott's motion for judgment in state court facially appears to be a state claim, the federal court must occasionally look beyond the pleadings "to determine whether the real nature of the claim is federal, regardless of

the plaintiff's characterization." Federated Department Stores v. Moite, 452 U.S. 394, 397 n.2 (1981) (quoting 14C Wright, Miller, & cooper, Fed. Prac. & Proc. § 3722 (1976)). The district court must review and analyze "the origins and substance of" the complaint and determine whether the plaintiff "had attempted to avoid removal jurisdiction by artfully casting [his] essentially federal law claims as state-law claims." Federated Department Stores v. Moite, 452 U.S. at 397 n.2. The district court must exercise its jurisdiction to determine whether it has jurisdiction over the purported state law claims. In Scott XIII, as in Moite, this determination involves *res judicata* concerns.

The facts in Scott XIII are similar in important respects to those presented to the Supreme Court in Moite. In Moite, two plaintiffs whose claims had been dismissed in federal court refilled the actions in state court. The state court actions purported to raise only state-law claims, but the allegations involved "the same parties, the same alleged offenses, and the same time periods" as the previously dismissed federal claims. Id. at 396. Upon removal, the district court dismissed the claims on grounds of *res judicata*. Id. The district court "held that the complaints, though artfully couched in terms of state law, were in many respects identical with the prior complaints, and were thus properly removed to federal court because they raised essentially federal law claims." Id. (quotations omitted). The Court of Appeals for the Ninth Circuit reversed on grounds of a public policy exception to *res judicata*, which the Court described as "a rule of fundamental and substantial justice, 'of public policy and private peace.'" Id. at 401 (quoting Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917)).

The doctrine of *res judicata* precludes a plaintiff from bringing a claim that he brought or could have brought in a prior action. Federated Department Stores v. Moite, 452 U.S. at 398 (citing Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac, 94 U.S. 351, 352 (1877)). Thus, a prior cause of action embraces and perhaps precludes subsequent litigation of "all rights of the plaintiff to remedies against the defendant[s] with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) Judgments § 24. If an action is based on the same series of events or transactions as previously litigated, then the district court has jurisdiction continuing from its jurisdiction in the prior litigation.

The allegations in Scott XIII involve, for the most part, the same parties, the same alleged offenses, and the same time periods as did Scott IV, Scott VI, Scott IX, and Scott XI. Even Scott's claims arising from defendants' new conduct, the presentation of evidence during Scott's contempt hearing in this Court, are part of the same series of transactions or events giving rise to prior litigation. Moreover, it is clear, as will be discussed herein, that Scott filed this action in state court in an effort to avoid the prefiling injunction that this Court has imposed against him. Thus, the Court **FINDS** that it has jurisdiction over this action, Scott XIII. For these reasons, the Court also **DENIES** Scott's motion to remand.

B. Res Judicata

The doctrine of *res judicata*, or claim preclusion, provides that "a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Restatement (Second) Judgments § 19 (1982). "To establish a *res judicata* defense, a party must

establish: (1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." Jones v. SEC, 115 F.3d 1173, 1178 (4th Cir. 1997). Federal, not state, law determines the preclusive effect of a prior federal judgment. Shoup v. Bell & Howell Co., 872 F.2d 1179 (4th Cir. 1989).

The relevant earlier litigation, Scott IV, Scott VI, Scott IX, and Scott XI, resulted in final judgments on the merits.[16]

By arguing that Scott XIII raises only state claims, Scott impliedly raises the issue of whether the claims in the subsequent litigation are substantially the same as those in the prior litigation. Even were the court to consider these claims as only state-law claims, they are nonetheless barred by *res judicata*. The claims extinguished include "all rights of the plaintiff to remedies against the defendant[s] with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) Judgments § 24. Claim preclusion bars not only those claims that Scott actually brought but also those claims that he could have brought because they arose out of the same transaction or series of transactions as the previous litigation.

Thus the only remaining element to consider is whether the parties were identical or were in privity with the original parties. The privity requirement is met when "the

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16 Denial of Scott's motion to amend in Scott IX constitutes *res judicata* on the merits. See King v. Hoover Group, Inc., 958 F.2d 219, 223-23; Shoup v. Bell & Howell Co., 872 F.2d 1179 (4th Cir. 1989); see also Scott v. Norfolk Southern, et al., Civil Action No. 2:99cv348 (E.D. Va., Mar. 27, 2000) (order dismissing case).

person [allegedly] in privity is so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." Jones v. SEC, 115 F.3d, at 1180 (internal quotation marks omitted).

Scott had previously objected in federal (Scott X) and state court, to preliminary efforts to collect court-imposed sanctions by all the defendants named in Scott XIII except for David N. Payne, Ernie Price, M.J. Moore and Robert C. Scaro. Scott alleges that Payne and Scaro[17] were attorneys for Williams, Kelly & Greer and apparently brings this action against them in that capacity. Moreover, in his motion for judgment, Scott refers to Webster, Mullen, Scaro, and Payne "collectively with WKG . . . as the 'WKG Defendants'." Because Payne and Scaro appear to be so identified with Webster, Mullen, and Williams, Kelly & Greer, defendants in Scott X, the Court **FINDS** that, for the purposes of *res judicata*, Payne and Scaro represent the same legal right with respect to Norfolk Southern's efforts to collect sanctions. Accordingly, the Court **FINDS** Payne and Scaro to be in privity with the defendants in Scott X.

Scott had previously asserted claims on the alleged employment contracts and the release agreements against all parties, including the "WKG defendants," named in Scott XIII except for Price, Vega, Moore, and Scaro. Although Scott alleged that Vega and Price were also employees of Norfolk Southern, the defendants have denied this allegation. Insofar as Scott is suing Vega and Price in their

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[17] The Court makes no finding as to whether Scaro was an attorney for Williams, Kelly & Greer. If was son employed, then Scott's claims against him are barred by claim preclusion; if he is not, then Scott's claims against him would necessarily be dismissed for failure to state a claim upon which relief could be granted.

alleged capacities as employees of Norfolk Southern, its agents, and employees, the Court **FINDS** that Vega and Price were in privity with the defendants in prior litigation.[18]

Accordingly, the Court **FINDS** that Scott's claims concerning the alleged employment contracts are barred by claim preclusion stemming from his having previously enjoyed a full and fair opportunity to litigation these matters in Scott V, Scott VI, and Scott IX. The Court **FINDS** that Scott's claims with respect to the Release Agreements are barred by claim preclusion because he had a full and fair opportunity to litigate these matters in Scott IV, Scott VI, Scott IX, and Scott XI. The Court **FINDS** that Scott's claims with respect to defendants' preliminary efforts to collect court-imposed sanctions are barred by claim preclusion because he had a full and fair opportunity to litigate these matters in Scott X as well as in state court.

C. Defendants' Presentation of Evidence During the Contempt Hearing

As a new cause of action stemming from the defendants' presentation of evidence during the contempt hearing, Scott alleges that the defendants "humiliated, belittled, defamed and insulted Scott, and evinced an intent to maliciously prosecute (both civilly and criminally) Scott in the federal court in order to force payment of the sanctions." The Court **FINDS** that Scott has failed to state a claim upon which relief can be granted and that he has

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18 The Court makes no finding as to whether Vega and Price are employees of Norfolk Southern. If they are employees, then Scott's claims against them are barred by claim preclusion; if they are not employees of Norfolk Southern, Scott's claims against them would necessarily be dismissed for failure to state a claim upon which relief could be granted.

filed these additional claims in bad faith with the sole purpose of harassing the defendants.

D. Frivolous and Vexatious Nature of the Suit

Rule 11 of the Federal Rules of Civil Procedure imposes a duty that pleadings be well-grounded in fact and law and not interposed for an improper purpose. See also Introcasco v. Cunningham, 857 F.2d 965, 970 (4th Cir. 1988).

Scott has filed over a dozen lawsuits against Norfolk Southern, its agents, and employees over the last five years. Moreover, as the Court has often observed, when the Court denies one of Scott's motions, dismisses his case, or sanctions Scott, Scott either moves the Court to vacate or initiates another action. For example, through motions or new actions, Scott has asked this Court ten times to rule on his allegations of fraud, breach of contract, and misrepresentation with respect to the Release Agreements. Although some of Scott's initial claims were meritorious-and he was awarded damages-much of Scott's subsequent litigation was instituted in this Court or in state court for improper purposes.

The Court has repeatedly advised Scott not to file frivolous claims. The Court imposed modest then increasing sanctions on Scott for filing such claims. On October 4, 1999, after having found Scott again in contempt, the Court ordered the United States Probation Office to produce a Pre-Sentence Investigation Report on Scott. Two days later, on October 6, instead of heeding the warnings against filing successive suits on the same issues, Scott filed a motion for judgment in the Circuit Court of Virginia Beach, alleging the same claims that he had raised numerous times in federal court. The Court **FINDS** that

this was an attempt to avoid the Court's prefiling injunction and an attempt to avoid the preclusive effect of litigation in this Court. Scott accuses the defendant of malicious abuse of the legal process. Clearly it is Scott who is abusing the legal process. "A litigious plaintiff pressing a frivolous claim, though rarely succeeding on the merits, can be extremely costly to the defendant[s] and can waste an inordinate amount of court time." Sassower v. Whiteford, Taylor & Preston, 940 F.2d 653 (4th Cir. 1991) (unpublished opinion) (quoting Harrelson v. United States, 613 F.2d 114, 116 (5th Cir. 1980).

IV. Conclusions

For the most part, Scott XIII is based on the same allegations that Scott raised in Scott IV, Scott VI, Scott IX, and Scott XI. To the extent that Scott XIII asserts claims based on the new conduct of the defendants, namely their presentation of evidence during Scott's contempt hearing, the Court **FINDS** that Scott added these claims in bad faith and for the sole purpose of harassing the defendants. Accordingly, the Court **FINDS** that the present action constitutes frivolous and vexatious litigation.

Because of the frivolous and vexatious nature of Scott XIII and because claim preclusion bars Scott from reasserting these claims, the Court **DISMISSES** Scott XIII with prejudice. Scott's motion to remand is **MOOT.**

Scott is **ADVISED** that the Court views his filing claims stemming from the same facts and issues previously litigated in federal court as contumacious behavior. However, because Scott is currently serving six months probation for contempt of court on a related matter, Scott X (2:98cv180), the Court shall, at this time, withhold ruling on whether sanctions should be imposed.

Scott is further **ADVISED** that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this order.

The Clerk is **DIRECTED** to send a copy of this order to Plaintiff and to all counsel of record.

It is so **ORDERED.**

/s/ _____
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
April 7, 2000

Petitioner's Appendix E
Scott XIII Motion for Judgment

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICHAEL A. SCOTT, pro se
4753 Longmont Road
Virginia Beach, Virginia
23456-5017

Plaintiff,

vs.

Law No._____
JURY TRIAL DEMANDED

MOTION FOR JUDGMENT

NORFOLK SOUTHERN CORPORATION
c/o James C. Bishop, Jr.
Registered Agent
Three Commercial Place
Norfolk, Virginia 23510
and
TIMOTHY A. HEILIG
110 Franklin Road
Roanoke, Virginia 24042
and
DAVID R. GOODE
Three Commercial Place
Norfolk, Virginia 23510
and
STEVEN C. TOBIAS
Three Commercial Place
Norfolk, Virginia 23510

and
JON L. MANETTA
110 Franklin Road
Roanoke, Virginia 24042
and
DONALD W. MAYBERRY
110 Franklin Road
Roanoke, Virginia 24042
and
WILLIAM E. HONEYCUTT
110 Franklin Road
Roanoke, Virginia 24042
and
LEWIS D. HALE
110 Franklin Road
Roanoke, Virginia 24042
and
DONALD D. GRAAB
110 Franklin Road
Roanoke, Virginia 24042
and
ARTIS L. LUTTRELL
110 Franklin Road
Roanoke, Virginia 24042
and
C. DAVID VITTUR
110 Franklin Road
Roanoke, Virginia 24042
and
JERRY R. GRAY
110 Franklin Road
Roanoke, Virginia 24042
and
WAYNE F. HENLEY
2200 Redgate Avenue
Norfolk, Virginia 23507

and
JEFF E. PAIR
2200 Redgate Avenue
Norfolk, Virginia 23507
and
JERRY W. CLEMMER
2200 Redgate Avenue
Norfolk, Virginia 23507
and
ERNIE PRICE
2200 Redgate Avenue
Norfolk, Virginia 23507
and
ELIAS I. VEGA
2200 Redgate Avenue
Norfolk, Virginia 23507
and
M. J. MOORE
2200 Redgate Avenue
Norfolk, Virginia 23507
and
WILLIAM D. CATRON, JR.
110 Franklin Road
Roanoke, Virginia 24042
and
ROGER A. PETERSEN
Three Commercial Place
Norfolk, Virginia 23510
and
MARK D. PERREAULT
Three Commercial Place
Norfolk, Virginia 23510
and
SAMUEL J. WEBSTER
600 Crestar Bank Building
500 East Main Street

Norfolk, Virginia 23514-3416
and
HEATHER A. MULLEN
600 Crestar Bank Building
500 East Main Street
Norfolk, Virginia 23514-3416
and
ROBERT C. SCARO
600 Crestar Bank Building
500 East Main Street
Norfolk, Virginia 23514-3416
and
DAVID N. PAYNE
1 Commercial Place, Suite 200
Norfolk, Virginia 23510
and
WILLIAMS KELLY & GREER, P.C.
c/o Jack E. Greer
Registered Agent
600 Crestar Bank Building
500 East Main Street
Norfolk, Virginia 23514-3416
Defendants.

MOTION FOR JUDGMENT

I. PARTIES

1. Plaintiff is a black male citizen and resident of the Commonwealth of Virginia residing in Virginia Beach. Plaintiff worked for defendant Norfolk Southern Corporation ("NS") from August 16, 1985 until it terminated his employment on February 16, 1996. Plaintiff was hired to worked for NS in Atlanta, Georgia and last worked for NS as it's coal loading facility in Norfolk, Virginia. NS is a transportation company with its principal

place of business in Norfolk, Virginia and conducts business under the laws of the Commonwealth of Virginia.

2. Defendants David R. Goode, Steven C. Tobias, Donald W. Mayberry, Jon L. Manetta, William E. Honeycutt, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Timothy A. Heilig, Lewis D. Hale, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair, and Jerry W. Clemmer are white male residents of the Commonwealth of Virginia (collectively referred to hereinafter as the "Fourteen Individual Defendants"), supervisors and officers of NS and each is being sued in his individual capacity. Defendants William D. Catron, Jr., Mark D. Perreault, Ernie Price, Elias I. Vega, M. J. Moore and Roger Petersen are male residents of the Commonwealth of Virginia, employees of NS and each is being sued in his individual capacity. The Fourteen Individual Defendants, Catron, Perreault, Price, Vega, Moore and Petersen will be referred to collectively hereinafter as the "individual defendants."

3. Defendants Samuel J. Webster, Heather A. Mullen Robert C. Scaro and David N. Payne are white residents of the Commonwealth of Virginia, were attorneys and or partners in the law firm of Williams Kelly & Greer, P.C. ("WKG") (collectively with WKG referred to hereinafter as the "WKG Defendants") in October 1996 and each is being sued individually and in his or her official job capacity with WKG. Defendant WKG is a professional corporation of attorneys and counselors-at-law with its principal place of business in Norfolk, Virginia and conducts business under the laws of the Commonwealth of Virginia. The WKG Defendants have been the attorneys for NS and the individual defendants representing them in lawsuits previously filed by the plaintiff. The conduct of the WKG defendants alleged herein was ratified and authorized by all defendants.

II. PLAINTIFF'S ALLEGATIONS

COMES NOW plaintiff, Michael A. Scott ("Scott"), as *pro se*, to allege the following in support of judgment against the defendants:

4. This is an action for monetary and other appropriate relief, including costs, attorney's fees and expert witness fees, to redress deprivation of Scott's rights.

5. On or about September 2, 1994, NS's Chief Executive Officer David R. Goode disseminated to Scott and all other employees of NS a letter guaranteeing all NS employees, including Scott, "the right to do your job without fear or concern of unwanted attention from your fellow employees" and "the right to the dignity and respect that you need to perform at your best, to enjoy your work and to help Norfolk Southern accomplish its mission." The CEO further guaranteed that he was "personally committed to making sure that right is not infringed." The letter further directed that "[a]ll Norfolk Southern employees should abide by the laws that prohibit unlawful discrimination, sexual harassment and retaliation in the work place."

6. During the period beginning in March 1993 and ending with the termination of Scott's employment on February 16, 1996, Scott was subjected to "unwanted attention" in the form of "unlawful discrimination, sexual harassment and retaliation in the work place" by the individual defendants in violation of specific guarantees set forth in the written contract. Specifically, the individual defendants subjected Scott to racial harassment and retaliation in the form of abusive and hostile racial language using words such as nigger and regginrail (liarnigger when lettering is reversed); racial harassment and retaliation in

the form of isolation by peers in the work place; racial harassment and retaliation in the form of increased work load and threats of bodily harm by defendants Clemmer, Henley and Moore; racial harassment and discrimination in the form of an assault and battery by defendant Catron on February 15, 1996; sexual harassment in the form of repeated unwanted physical contact in the workplace by male coworkers; sexual harassment in the form of abusive and hostile homosexual language in the workplace by male coworkers; retaliation in the form of harassment and increased work load; retaliation in the form of abolishing Scott's mechanical foreman's position at NS's coal loading facility in Norfolk and transferring the position to Decatur, Illinois on February 16, 1996; and retaliation and racial discrimination in the form of terminating Scott's employment on February 16, 1996.

7. The aforesaid conduct of the defendants **breached** and **tortuously interfered** with the contract from defendant Goode guaranteeing Scott the right to work without such malicious, abusive and discriminatory conduct in the work place.

8. Scott was a member of a four person engineering staff at the coal loading facility. On or about November 10, 1995, defendant Gray met with Scott and provided him a letter announcing Scott's salary increase and stating that "the Engineering Staff will continue to perform well during 1996." On or about February 29, 1996, defendant Heilig sent Scott a letter announcing that "you will continue your accomplishments throughout 1996." These two letters announced that Scott's employment with NS would continue for all of 1996.

9. The conduct of the defendants in terminating Scott's employment **breached** and **tortuously interfered**

with the contracts assuring that Scott's employment would continue throughout 1996.

10. In the Fall of 1992 after Scott had sustained an injury at work which resulted in decreased vision in his right eye, NS master mechanic L. C. Smith informed Scott that the company was creating a new engineering position for him to work and that the position was created to be a permanent desk job so as to minimize Scott's exposure to the risk of injury in the railroad's work environment because of his monocular vision. NS's commitment to Scott for the creation of the new engineering position was memorialized through a series of written letters and written comments by its employees. Furthermore, because the permanent desk job had been created for Scott due to his monocular vision, he informed NS on his August 1994 and January 1995 job performance appraisals that he did not wish to relocate or transfer.

11. On or about January 10, 1996, the defendants initiated formal documents authorizing the abolishment of Scott's permanent engineering position and transferring Scott to Decatur, Illinois, both effective February 16, 1996. As a result of terminating Scott's employment, abolishing his engineering position and transferring it to Decatur, Illinois, the defendants **breached** and **tortuously interfered** with the written and oral agreements assuring Scott that he would remain on the permanent engineering position and would not be relocated or transferred.

12. On or about November 1, 1991, NS CEO Arnold B. McKinnon disseminated to Scott and its other employees a letter announcing the company's compliance policy, to which was attached a copy of the compliance policy. Scott was required to acknowledge and endorse his

receipt and reading of the policy which required him and all other employees to comply with applicable laws. The aforesaid conduct of the defendants in their "unlawful discrimination, sexual harassment and retaliation in the work place" **breached** and **tortuously interfered** with the compliance policy contract.

13. On August 16, 1986, NS and Scott entered into an employment contract in Atlanta under the laws of the state of Georgia. During the course of the hiring process, various NS employees told Scott that he was being hired for a lifetime career until his retirement. As part of that employment contract, NS provided Scott an employee benefits handbook in which the terms for his employment, specifically his retirement benefits, were set forth guaranteeing Scott employment until the retirement age of 65. The aforesaid malicious and reckless conduct of the defendants in their "unlawful discrimination, sexual harassment and retaliation in the work place," defamation, assault and battery, and termination **breached** and **tortuously interfered** with the employment contract.

14. The defendants, singularly and in concert, engaged in or aided a plan, scheme and unlawful course of conduct through a series of deceptive acts which led to their breach of the express and implied oral contractual agreement, understanding and covenant of good faith made with Scott when the WKG defendants (excluding defendant Payne) advanced the aforementioned affirmative defense pleas on behalf of Catron and Hedgepath in Scott IX; and failed to fulfill their agreement to draft and file the appropriate motions withdrawing their motion for sanctions filed and pending in Scott III and Scott VI as specifically required by the express language of the release agreements executed for those cases. The defendants expressly agreed with Scott in October 1996 that such a defense would not

be advanced as part of the agreed to arrangements made between Scott and Webster to resolve Scott III and Scott VI.

15. The release agreements Scott executed in Scott III and Scott VI specifically required the defendants to "withdraw" their motion for sanctions filed in those cases. The defendants failed to fulfill their obligation to "withdraw" the said motions with the federal court as agreed consequently breaching and tortuously interfering with the Scott III and Scott VI agreements. The only reason Scott agreed to voluntarily dismiss the Scott III and Scott VI lawsuits was because he and the defendants agreed to split the Scott VI claims and that Scott could file a separate lawsuit against Catron and Hedgepath, and because the defendants specifically agreed to file motions with the federal court to "withdraw" their motion for sanctions filed in Scott III and Scott VI at the same time they filed the dismissal orders in those cases. The settlement and release agreements Scott executed in Scott IV and Scott VII required the defendants to properly "eliminate" the monetary sanctions of $1,000.00 imposed against Scott in Scott VII pursuant to the letter Scott sent to the defendants initiating the settlement discussions on or about October 7, 1996 as he and the defendants had agreed to by filing the appropriate motions with the federal court. The defendants failed to fulfill their commitment to properly "eliminate" the $1,000.00 sanction awarded in Scott VII by filing the appropriate motions with the district court at the same time they filed the dismissal orders in those cases, consequently, breaching and tortuously interfering with the said agreements. The commitments made by the defendants fraudulently induced Scott to surrender his personal and property rights sued for in each of the four Scott cases which resulted in damage to him. Scott would not have surrendered his rights had the defendants revealed their

intentions not to fulfill the commitments made in the release agreements and during the settlement negotiations.

16. The initial oral agreement was negotiated by and between Scott and Webster over the telephone on or about October 8, 1996. Defendant Webster expressly and impliedly represented to Scott his agreement and commitment to maintaining the oral contract and agreement made after Scott executed the four releases and dismissal orders for Scott III, Scott IV, Scott VI and Scott VII. Webster willfully and intentionally made the agreement with Scott on three separate occasions, namely before, during and after Scott executed the releases and dismissal orders with no intent or plan of fulfilling the oral contract, agreement and understanding or the commitments made in the release agreements.

17. The conduct of the defendants **breached** and **tortuously interfered** with, and **conspired to breach** each of the subject release agreements.

18. The contract breaches and tortuous interference with the contracts by the defendants were neither justified nor excused by the plaintiff. In all such breaches and interference, the plaintiff was damaged as a result of the defendants malicious and reckless conduct.

19. NS, the individual defendants and the WKG Defendants, singularly and in concert, engaged in or aided a plan, scheme and unlawful course of conduct through a series of deceptive acts to enter into settlement negotiations, and oral and written agreements with Scott which they never intended to fulfill. The defendants willfully agreed, singularly and in concert, to Webster entering into settlement negotiations and subsequently a contractual agreement with Scott with the express intent of obtaining

Scott's release and dismissal of his federal court lawsuit in Scott VI (an action in which each of the individual defendants and NS were defendants) in exchange for an oral and written contractual agreement between Scott, NS and the individual defendants. Scott V and Scott VI were lawsuits Scott filed against NS and the Fourteen Individual Defendants in the United States District Court for the Eastern District of Virginia. As part of the settlement negotiations, all parties agreed that the Scott VI release agreement would not be used in any manner whatsoever by any employee of NS, except the Fourteen Individual Defendants specifically identified in it by name, whom Scott intended to sue for the allegations which formed the basis of Scott V. Further, as part of the settlement negotiations, an agreement was made between the parties that Scott could pursue his claims against two NS employees, G. L. Hedgepath and defendant Catron, in a subsequent lawsuit unencumbered by any affirmative defenses growing out of the litigation pending in October 1996, including Scott V and Scott VI. The parties agreed that WKG would draft the Scott IV and Scott VII releases and dismissal orders. Scott IV was a case Scott had pending before the Virginia Supreme Court and Scott VII was a federal court lawsuit Scott filed against NS and the WKG Defendants in which the federal court imposed $1,000.00 in sanctions against Scott and in favor of NS and the WKG Defendants.

The defendants intentionally and deliberately misled and concealed relevant facts from Scott about their intentions and about the language of the release agreement for Scott VI. Specifically, the negotiating parties agreed to split claims allowing Scott to pursue his Scott VI allegations against Catron and Hedgepath in a separate lawsuit in exchange for its dismissal and the dismissal of Scott III. The defendants knew at the time the settlement negotiations and contractual agreement were made with Scott, including

all oral representations made therewith, that they would not perform on the negotiated understandings and agreements, and that their commitments were fraudulent and would mislead Scott and fraudulently induce him to execute the release agreements and dismissal orders for each Scott case, especially since Scott was litigating without the aid of professional counsel. Of particular significance, Webster, in his role as an attorney and officer of the court, provided Scott with false and misleading legal interpretations about the release agreements and dismissal orders, and about his clients intent to file motions with the federal court withdrawing their motions for sanctions as agreed.

The defendants concealed their secret intent to allow Catron and Hedgepath to plead affirmative defenses in the action the parties agreed could be pursued by Scott unencumbered by any affirmative defense pleas of release, *res judicata* or *collateral estoppel*. Significantly, the defendants rejected Scott's demand to include language in the release agreements and dismissal orders regarding the affirmative defense pleas and Scott VI claim splitting, and instead asserted to Scott that Catron and Hedgepath would be represented by the WKG defendants and no affirmative defense pleas would be advanced in the separate action. On or about February 3, 1998, Catron and Hedgepath, being represented by the WKG Defendants (excluding defendant Payne), pleaded release, *res judicata* and *collateral estoppel* in their answer to Scott's complaint filed against them in federal court, at which point Scott realized he had been deceived and misled about the true intentions of the defendants. Furthermore, as additional consideration for Scott executing the Scott III and Scott VI releases and dismissal orders, the defendants also agreed during the settlement negotiations that they would draft and file the appropriate motions with the federal court to "withdraw" their motion for sanctions filed and pending in other Scott

cases as reflected in each of the written release agreements. Specifically, the Scott III and Scott VI settlement and release agreements stated: **"WHEREAS,** the Individual Parties and NS have agreed to withdraw the Motion for Sanctions currently pending in the Federal Court Action." The defendants made these representations to Scott either knowing that said representations were false at the time made and were made fraudulently, deliberately, maliciously and willfully with gross negligence or with a wanton, willful and reckless disregard for the rights of Scott which fraudulently induced him to execute the release agreements and dismissal orders so that they could secure the dismissal of the Scott lawsuits without giving Scott the benefit of any consideration or the agreed to arrangement for Scott to sue Catron and Hedgepath in a separate lawsuit. Scott relied on the defendants' representations in this regard in deciding to execute the releases and dismissal orders and would not have executed them had he known that the defendants would not fulfill the commitments made orally to him and in the written agreements.

The District Court entered judgment dismissing Scott's complaint against Catron and Hedgepath on June 30, 1998 ruling that it was barred by *res judicata* and *collateral estoppel.* As a result of that ruling, the District Court awarded $5,000.00 in monetary sanctions against Scott for filing that action. Scott negotiated with the defendants in good faith and, believing that they were negotiating in good faith with him, relied, to his detriment, on the defendants fraudulent oral and written representations in deciding to execute each of the releases and dismissal orders on October 10, 1996. It was on or about December 10, 1997 after Scott filed the lawsuit against Catron and Hedgepath that he realized Catron and Hedgepath were considering the release as providing a defense for them. The conduct of the defendants inflicted

injury on Scott fraudulently inducing him to surrender in good faith his property rights being sued for in the Scott cases and his property interest affected by the $5,000.00 sanctions imposed by the federal court for filing Scott IX after the parties agreed that Scott could file suit in exchange for dismissing Scott III and Scott VI.

The conduct of the defendants **fraudulently induced** Scott to execute the release agreements and dismissal orders, and evinced an intent to practice **actual fraud** and or **constructive fraud, deceit** and or **misrepresentation.**

20. In the course of litigating Scott X in the federal court, the defendants (excluding defendant Payne) singularly and in concert, engaged in or aided a plan, scheme and unlawful course of conduct through a series of deceptive acts in representations they made to Scott and the federal court in or around June 1998. Specifically, the defendants prepared and then submitted to the Virginia Beach circuit court for authorization a summons to answer interrogatories under § 8.01-506 on or about June 3, 1998. In that summons, the defendants willfully and maliciously misrepresented that a writ of fieri facias had been issued on June 3, 1998 upon which they would base their collection efforts. The defendants served the summons on Scott on June 4, 1998. No valid writ of fieri facias was issued. However, defendant Mullen represented to Scott and the federal court in affidavit testimony that the summons to answer interrogatories the defendants prepared was "[t]rue and correct." Scott relied on those representations to his detriment and as a result of such reliance and the misrepresentations made, the federal court imposed a $5,000 sanction against him finding that the defendants' conduct was proper when, in fact, it was not since having a writ of fieri facias was a fundamental prerequisite for a

judgment creditor to institute collection proceedings in Virginia.

The conduct of the defendants (excluding Payne) **fraudulently induced** the imposition of a $5,000 sanction against Scott by the federal court, and evinced an intent to practice **actual fraud** and or **constructive fraud, deceit** and or **misrepresentation.**

21. On June 15, 1998, the defendants (excluding Payne) singularly and in concert, engaged in or aided a plan, scheme and unlawful course of conduct summoning Scott to improperly instituted debtors interrogatories before Commissioner in Chancery James A. Gorry, III and to produce various documents itemized in a subpoena duces tecum they obtained from the Virginia Beach circuit court. The debtors interrogatory session and subpoena were entirely improper because there was no writ of fieri facias authorizing them, which is a basic prerequisite to instituting collection proceeding in Virginia. The defendants have since instituted additional collections proceedings making their collection efforts a frequent and continuous occurrence. During the debtors interrogatory session, defendant Mullen improperly seized $40.00 from Scott on authority of and in concert with Commissioner Gorry. The defendants (excluding Payne) caused process to issue in the collection proceedings and then misused such process to accomplish their ulterior motives of harassing and retaliating against Scott for having sued them on previous occasions.

The malicious and willful conduct of the defendants (excluding Payne) evinced an intent to **maliciously abuse the legal process** and to **maliciously prosecute** Scott during the collection proceedings, which also violated Scott's rights under **Article I, § 11 of the Virginia Constitution.**

22. On or about July 28, 1999, the federal court ordered "Scott to appear before this Court on Thursday, August 26, 1999 at 9:15 a.m. to show cause why he should not be held in contempt for filing yet another motion to vacate." During the hearing, the federal court asked the WKG Defendants (excluding Payne) if they wished to be heard in connection with the proceeding and that the court would allow them to be heard first. Defendant Webster responded: "Your Honor, we have no reason to be heard at this point." At the conclusion of Scott's discussions with the federal court, the federal court again asked defendant Webster if he and his clients had any input. At that time, defendant Webster proceeded to introduce two letters received from Scott offering to settle all litigation with the defendants. Thereafter, defendant Webster then accused Scott of illegally practicing law by "working on other lawsuits that are being filed in this [federal] court." Defendant Webster further stated: "So we would support a contempt finding based upon those additional facts, and at a minimum ask that the court either stay or dismiss all pending cases unless he pays the sanctions, judgments within 30 days." The letters introduced by defendant Webster and the malicious accusation against Scott of illegally practicing law had absolutely nothing to do with the specific reason the show cause hearing was held and represented allegations completely irrelevant to that proceeding. The defendants' ulterior motives were clearly to use the show cause hearing to attempt to force Scott and or whip him into payment of the sanctions.

23. After Defendant Webster accused Scott of illegally practicing law, the federal court questioned Scott under oath about those allegations. After Scott finished testifying, defendant Webster introduced in evidence to the federal court deposition testimony of George Mungin in support of the defendants (excluding Payne) malicious

allegations. The defendants improperly, and over the objections of Mr. Mungin's counsel, obtained Mr. Mungin's testimony regarding the manner in which he prepared the complaint he filed pro se in the federal court against defendants NS, Price and Henley. The defendants recklessly and maliciously and with evil intent conspired and agreed to, singularly and in concert, to misuse and abuse the legal process in the Mungin case, during which the WKG defendants (excluding Payne) were counsel, to obtain evidence to support their false beliefs and malicious allegations against Scott. Scott did not know about or participate in the Mungin deposition proceeding. The matter of who prepared Mr. Mungin's complaint was completely irrelevant to his complaint allegations of discrimination and even more irrelevant to the show cause hearing regarding the motion to vacate Scott filed. Nevertheless, the defendants used Mr. Mungin's deposition testimony to accuse Scott of perjury before the federal court. In response to that testimony, the federal court continued the show cause hearing until October 1, 1999 at which time it subpoenaed Mr. Mungin to testify. The defendant's campaign of accusing Scott of perjury continued at that continued hearing.

The malicious and willful conduct of the defendants (excluding Payne) humiliated, belittled, **defamed** and **insulted** Scott, and evinced an intent to **maliciously abuse the legal process** and to **maliciously prosecute (both civilly and criminally)** Scott in the federal court in order to force payment of the sanctions.

DECLARATORY JUDGMENT

COMES NOW plaintiff, Michael A. Scott, as *pro se*, to allege the following in support of a Declaratory Judgment against the WKG Defendants, NS and the

Fourteen Individual Defendants:

24. Plaintiff incorporates paragraphs 14, 15, 16 and 19 herein by reference as though fully set forth herein.

25. Plaintiff requests that the Court enter an Order declaring four settlement and release agreements he executed in favor of the defendants on October 10, 1996 as invalid and unenforceable on the grounds of fraud, duress and oppression, unconscionable, misleading, mistake, and as against public policy; and for a finding that the defendants actually and or constructively defrauded, misled and deceived Scott in the course of negotiating for and obtaining the four settlement and release agreements.

26. United States District Judge Henry Coke Morgan, Jr. informed Scott and the defendants on February 25, 1998 that neither of the parties to the releases had the authority to dismiss the federal court's $1,000.00 sanctions imposed against Scott in Scott VII as part of the parties negotiations which led to the Scott IV and Scott VII release agreements and dismissal orders. Specifically, the federal district court stated:

"The Court observes that there was discussion on the release issue in some of this litigation whereby the defendant released the plaintiff from a sanction award by the Court in consideration of other undertakings.

The Court advises the defendants and the plaintiff that if the Court imposes sanctions, only the Court may release a party from sanctions; the sanctions may not be released by any kind of agreement between the parties."

The defendants agreement to draft and file the appropriate motions to properly eliminate the $1,000 sanctions award represented the defendants consideration

given in exchange for the dismissal of Scott IV and Scott VII. The defendants knew or should have known that the proper way to eliminate the monetary sanctions imposed by the federal court against Scott was to file appropriate motions with that court as they expressly agreed with Scott to do. The defendants did not file the motions as agreed to with Scott nor did they request that the federal court release or vacate the sanctions award, but rather did nothing but file the dismissal orders Scott executed with the district court. The dismissal orders were entered in the cases before the federal court entered judgment for the sanctions award of which the federal district court was made keenly aware by the defendants when it made the above quoted comments to the parties. In early October 1996, the defendants combined collectively and then agreed with Scott to split his claims in Scott V with regard to defendant Catron and Hedgepath and file a separate suit against them at the conclusion of Scott V in federal court as consideration for his dismissal of Scott III and Scott VI. The Scott V case concluded in early April 1997. After Scott filed suit against Catron and Hedgepath in federal court in December 1997, the WKG Defendants asserted numerous affirmative defenses on their behalf. The case against Catron and Hedgepath was dismissed based on those affirmative defenses and Scott was sanctioned by the federal court for $5,000 for filing the case. Scott relied on the representations of the defendants in the course of the settlement negotiations in deciding to execute the settlement and release agreements and dismissal orders to his detriment and was **actually and constructively defrauded** by the defendants.

27. The settlement and release agreements, having been drafted by the WKG Defendants, specifically stated that the defendants would "withdraw" their motion for sanctions pending in the federal court. The defendants

failed to withdraw their motions as required by the specific terms of the agreements. The defendants representation to Scott that they would withdraw the motion for sanctions as consideration for executing the agreements encouraged Scott to execute the agreements as the defendants maliciously threatened Scott with the motion for sanctions during the course of the settlement negotiations.

28. The conduct of the defendants in the course of the settlement negotiations of defrauding, misleading and threatening Scott was neither justified nor excused by the plaintiff.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Michael A. Scott demands the following relief:

(1) Judgment against the defendants, jointly and severally, in the amount of ELEVEN MILLION AND 00/100 DOLLARS ($11,000,000.00), namely NINE MILLION SIX HUNDRED THOUSAND AND 00/100 DOLLARS ($9,600,000.00) in compensatory damages and ONE MILLION FOUR HUNDRED THOUSAND AND 00/100 DOLLARS ($1,400,000.00) in punitive damages, plus pre-judgment and post-judgment interest;

(2) an award of attorney fees, expert witness fees and cost of suit;

(3) such other equitable relief as the Court deems proper and just;

(4) an Order declaring each of the four releases as invalid and unenforceable; and

(5) such other legal relief under any causes of action not specifically mentioned herein which may be applicable under the laws of the Commonwealth of Virginia.

Respectfully submitted,

/S/ Michael A. Scott
Plaintiff, *pro se*

Michael A. Scott
4753 Longmont Road
Virginia Beach, Virginia
23456-5017
(757) 495-0844

Petitioner's Appendix F
Scott XIII Notice of Removal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

MICHAEL A. SCOTT,
Plaintiff,

v. CIVIL ACTION NO. _____

NORFOLK SOUTHERN CORPORATION, et al.,
Defendants.

NOTICE OF REMOVAL

Defendants, Norfolk Southern Corporation, Timothy A. Heilig, David E. Goode, Steven C. Tobias, Jon L. Manetta, Donald W. Mayberry, William E. Honeycutt, Lewis D. Hale, Donald W. Graab, Artis L. Luttrell, C. David Vittur, Jerry L. Gray, Wayne F. Henley, Jeff E. Pair, Jerry W. Clemmer, Ernie Price, Elias I. Vega, M. J. Moore, William D. Catron, Jr., Roger A. Petersen, Mark D. Perreault, Samuel J. Webster, Heather A. Mullen, Robert C. Scaro, David N. Payne and Williams Kelly & Greer, P.C., hereby give notice to this Court, pursuant to 28 U.S.C. § 1441, of removal of the above styled action (hereinafter "this action"), currently pending in the Circuit Court of the City of Virginia Beach, Law No. CL99-2577, and as grounds of removal states as follows:

1. The removing parties are defendants in this action.

2. Plaintiff filed this civil action in the Circuit Court of the City of Virginia Beach on October 5, 1999. Pursuant to 28 U.S.C. § 1446(a), a copy of the Motion for Judgment, with copies of the respective Notices of Motions for Judgment served upon the defendants, is attached hereto as Exhibit A. As of October 28, 1999, defendants Manetta, Hale, and Luttrell had not been served and defendants Catron had not been properly served, if served at all.

2. All defendants in this action join in this Notice of Removal.

3. No further proceedings have occurred in this action in the Circuit Court of the City of Virginia Beach.

4. The Motion for Judgment seeks money damages and declaratory relief against all defendants.

5. The allegations of the Motion for Judgment assert claims which invoke the jurisdiction of this Court under its power to hear matters concerning a federal question. Specifically it alleges, in part:

a. That "Scott was subjected to 'unwanted attention' in the form of 'unlawful discrimination, sexual harassment and retaliation in the work place. . . .'" (Motion for Judgment, Paragraph 6);

b. That the "individual defendants" subjected Scott to racial harassment and retaliation in the form of abusive and hostile racial language, isolation by peers in the workplace, increased workload and threats of bodily harm; racial harassment and discrimination in the form of a February 1996 assault and battery; sexual harassment in the form of repeated unwanted physical contact and abusive and hostile homosexual language in the

workplace; retaliation in the form of harassment and increased work load, job abolishment, and transfer; and retaliation and racial discrimination in the form of terminating Scott's employment" (Motion for Judgment, Paragraph 6);

6. While Plaintiff has attempted to couch his discrimination forms in the guise of "contract" claims, the Motion for Judgment reveals that Title VII and other discrimination laws are the true basis for Plaintiff's claims.

7. In addition, the Motion for Judgment seeks relief for alleged conduct which is directly connected to prior and continuing litigation in this Court, including the effect of releases executed in prior cases, the dismissal of prior cases, the imposition of sanctions by this Court, and a finding of criminal contempt against the Plaintiff in which sentencing is currently pending before this Court.

8. The Motion for Judgment sets forth separate and independent claims of a civil nature over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1331.

9. This action is removable to this Court pursuant to 28 U.S.C. § 1441 (b) and (c), and this Court may determine all issues therein.

10. This Notice of Removal is filed with this Court within 30 days of the date this action was filed in the Circuit Court of the City of Virginia Beach.

11. Written notice of the filing of this Notice of Removal will be provided pursuant to 28 U.S.C. § 1446 (d).

12. A copy of this Notice of Removal will be filed in the office of the Clerk of the Circuit Court of the City of Virginia Beach pursuant to 28 U.S.C. § 1446 (d).

Wherefore, defendants, Norfolk Southern Corporation, et al., request that this action be removed from the Circuit Court of the City of Virginia Beach and proceed in this Court as an action properly removed to it.

NORFOLK SOUTHERN CORPORATION, ET AL.

By /s/ Heather A. Mullen
Of Counsel